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No. 510

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

AMERICAN TRUCKING ASSOCIATIONS, INC., AND NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC.,
Appellants,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,
Appellees.

On Appeal from the United States District Court for the Eastern District of Pennsylvania

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JURISDICTIONAL STATEMENT

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No. ——

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Appellants,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,
Appellees.

On Appeal from the United States District Court for the Eastern District of Pennsylvania

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JURISDICTIONAL STATEMENT

Appellants, American Trucking Associations, Inc., and National Motor Freight Traffic Association, Inc., appeal from the judgment of the United States District Court for the Eastern District of Pennsylvania, entered on June 11, 1965, dismissing our complaint to set aside the report and two orders of the Interstate Commerce Commission, and submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW

A copy of the opinion of the district court is attached hereto as Appendix A, and a copy of its judgment and decree as Appendix B. A copy of the report and order of the Interstate Commerce Commission in *Motor Transportation of Property Within a Single State*, 94 M.C.C. 541 (1964), is appended as Appendix C, and a copy of the Commission's unreported order denying reconsideration, as Appendix D.

JURISDICTION

This suit was brought under 28 U.S.C. § 1336, to suspend, enjoin, annul, and set aside a report and two orders of the Interstate Commerce Commission. The judgment of the district court was entered on June 11, 1965, and notice of appeal was filed on July 1, 1965. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Sections 1253 and 2101(b) of the Judicial Code.[1] The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal: *United States* v. *Drum*, 368 U.S. 370 (1962); *American Trucking Associations, Inc.* v. *United States*, 364 U.S. 1 (1960); *Frozen Food Express, Inc.* v. *United States*, 351 U.S. 40 (1956).

STATUTES INVOLVED

The National Transportation Policy; Section 1, pars. (1), (1)(a), and (2)(a); Section 202, pars. (a), (b), and (c)(1); Section 203, pars. (a)(10), (13), (14), (15), and (b)(1)-(10); Section 204, pars (a)(1), (2), (3), and (4a); Sections 206 (a)(1), 216(b), 217(a), and 218(a) of the Interstate Commerce Act[2] are set forth verbatim in Appendix E hereto.

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[1] 28 U.S.C. §§ 1253 and 2101(b).

[2] 49 U.S.C. preceding § 1, and §§ 1(1), (1)(a), 2(a); 302 (a), (b), (c)(1); 303 (a)(10), (13), (14), (15), (b)(1)-(10); 304 (a)(1), (2), (3), (4a); 306(a)(1); 316(b); 317(a); 318(a).

QUESTIONS PRESENTED

1. Whether the Interstate Commerce Commission erred in holding that, for-hire motor transportation, within the confines of a single state, of property which has moved from, or will move to, points beyond the same state in private carriage, the entire movement being continuous, is not in interstate commerce subject to economic regulation under Part II of the Interstate Commerce Act?

2. Whether the district court, in affirming the orders and holding of the Commission, properly construed the law and correctly concluded that the Interstate Commerce Commission is without economic jurisdiction to regulate the for-hire carriage involved?

STATEMENT OF THE CASE

On January 15, 1962, South Paterson Trucking Co., Inc., filed a petition with the Commission asking for a declaratory order making definite and certain the application of Section 206(a)(1) of the Interstate Commerce Act when merchandise is transported into a state in proprietary carriage and is ultimately delivered to points in the same state by for-hire carriage, the entire movement being continuous. Underlying the petition was a difference of opinion that had developed between certain divisions of the Commission. In *Dora Motor Carrier Operations Within Arizona*, 49 M.C.C. 171(1948), *Eldon Miller, Inc., Extension—Illinois*, 63 M.C.C. 313(1955), and *Hafner and Hanson Common Carrier Application*, 69 M.C.C. 581 (1957), division 1 and former division 5 had held that the described for-hire motor transportation was subject to economic regulation under the Act and required operating authority. But in *Holliday* v. *Liberty*, 53 M.C.C. 22(1951), and in *Iron and Steel, Central Territory*, 53 M.C.C. 769(1951), division 3 had held that similar for-hire transportation was not subject to regulation under

the Act, and that rates for such service did not have to be filed with the Commission.

By order dated May 21, 1962, the Commission instituted a rule-making proceeding, entitled Docket No. MC-C-3626, *Motor Transportation of Property Within A Single State*, to resolve this conflict between the divisions. The Commission invited motor, rail, and water carriers, and any other interested persons, to participate in the proceeding by submitting, for consideration, written statements of facts, views, and arguments. Thirty-seven such statements were filed with the Commission for its consideration, including statements by appellants.

On March 2, 1964, the Commission issued its decision wherein it found that for-hire transportation, within the confines of a single state, of property which has moved from, or will move to, points beyond the same state in private motor carriage, is, so far as the for-hire transportation is concerned, in intrastate commerce, and not in interstate commerce subject to economic regulation [3] under Part II of the Act. The Commission overruled those cases inconsistent with its finding. Four Commissioners dissented.[4]

Appellants, among others, pursuant to the Commission's General Rules of Practice, filed a petition for recon-

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[3] There are two broad fields of regulation under the Interstate Commerce Act—economic and safety. The so-called "regulated for-hire" motor carriers are subject to both economic and safety regulation, whereas private carriers, among others, are subject only to safety regulations, which cover qualifications and maximum hours of service of employees, and standards of equipment. The economic regulation of for-hire motor carriers embraces, to name only a few, such matters as (1) certificate requirements; (2) requirements of reports and prescription of a uniform system of accounts; (3) publication of rates and observance of rates; (4) requirement of insurance or surety bonds; and (5) requirement of Commission approval of certain consolidations and mergers. See, Taff, *Commercial Motor Transportation*, 514-517 (3rd ed. 1961).

[4] Appendix C, pp. 550-551.

sideration of the Commission's decision. By order dated August 5, 1964, the Commission denied all the petitions,[5] and its decision was administratively final.

The Pennsylvania Railroad Company filed a complaint on September 28, 1964, in the United States District Court for the Eastern District of Pennsylvania, alleging that the Commission incorrectly interpreted the law, and asked the court to set aside and annul the Commission's report and orders.

On October 6, 1964, appellants filed motions for leave to intervene in support of the position of the railroad. Shortly thereafter, Private Carrier Conference, Inc., South Paterson Trucking Co., Inc., National Industrial Traffic League, and the Pennsylvania Public Utility Commission filed motions for leave to intervene as defendants in support of the Commission. The district court granted all the motions and intervenors actively participated in the proceeding.

The district court handed down its decision on April 23, 1965. The court held that the report and orders of the Commission were in accordance with the applicable law, and it entered an order on June 11, 1965, dismissing plaintiffs' complaints.

THE QUESTIONS ARE SUBSTANTIAL

The issue in this proceeding is whether the Commission and the district court erred, as a matter of law, when they held, based upon *Pennsylvania R. Co.* v. *Ohio Public Utilities Comm.*, 298 U.S. 170 (1936), that the Commission lacks authority to subject to economic regulation the operations of for-hire motor carriers transporting traffic which has moved or will move in private carriage across a state line, the entire movement being continuous.

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[5] Appendix D.

1. Two questions of law are raised by the facts in this proceeding. First, is this continuous movement transportation which Congress has placed within the regulatory authority of the Interstate Commerce Commission by virtue of the Motor Carrier Act, 1935,[6] which became Part II of the Interstate Commerce Act in 1940?[7] And, second, if so, what is the extent of the regulatory authority?

The answer to the first question turns on the meaning of Section 202(a) which generally defines the scope of Part II. It reads:

> The provisions of this part apply to the transportation of passengers or property by motor carriers engaged in interstate or foreign commerce . . . and the regulation of such transportation . . . is hereby vested in the Interstate Commerce Commission.

Section 203 (a) (10) amplifies Section 202(a) by defining interstate commerce:

> The term "interstate commerce" means commerce between any place in a State and any place in another State or between places in the same State through another State, whether such commerce moves wholly by motor vehicle or partly by motor vehicle and partly by rail, express, or water.

In turn motor vehicle is defined in Section 203(a) (13) as "any vehicle . . . propelled or drawn by mechanical power and used upon the highways in the transportation of passengers or property . . . ."

It is clear from the foregoing that a private carrier transporting his freight by motor vehicle from a place in one state to a place in another is engaged in interstate commerce as defined in Section 203(a) (10), and that he is subject to the regulatory authority of the Commission.

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[6] 49 Stat. 543, 49 U.S.C. §§ 301-328.

[7] 54 Stat. 919.

As to the for-hire segment of the involved movement, there can be no doubt either that this carrier is also engaged in interstate commerce as defined in that section, even though his portion of the movement is confined to transportation within a single state. This is so because the Commission has assumed for the purposes of this case that the shipper moves his freight across a state line, that he has a specific destination in another state in mind, and that the entire movement is continuous. And it is well settled that transportation performed by a for-hire carrier wholly within one state is transportation in interstate commerce if "the fixed and persisting intent of the shipper at the time of the shipment" is to move his property from an origin in one state to an ultimate destination in another, and if the transportation wholly within one state is part of a continuous movement carrying out that intent.[8]

Having shown that Section 202(a) gives the Commission authority to regulate the private and for-hire transportation, we turn next to the extent of that regulatory authority. Congress has given the Commission no authority to regulate economically the operations of private carriers; the Commission's authority respecting them is limited by Section 204(a)(3) to matters concerning safety. On the other hand, Sections 203(a)(14) and 203(a)(15) define two types of for-hire motor carriers, common and contract, as being subject to the Commission's regulatory authority. Section 204 provides that: "(a) It shall be the duty of the Commission—(1) To regulate common carriers by motor vehicle as provided in this part . . .," and "(2) To regulate contract carriers by motor vehicle as provided in this part . . . ." And the regu-

[8] *Atlantic Coast Line R. Co.* v. *Standard Oil Co.*, 275 U.S. 257 (1927); *Baltimore & Ohio S. W. R. Co.* v. *Settle*, 260 U.S. 166 (1922); *United States* v. *Majure*, 162 F. Supp. 594 (1957); *Petroleum Products Transported Within A Single State*, 71 M.C.C. 17 (1957).

lation "provided in this part" is of two categories—safety regulation and economic regulation.

The Commission's duty respecting safety regulation of for-hire carriers is discretionary in that Section 204(a)(1) provides that it "may" establish reasonable requirements as to qualifications and maximum hours of service of employees and safety of operation of equipment. Its duty, however, regarding economic regulation is not discretionary. Thus, Section 206(a)(1) provides that "no common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway . . . unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations." Section 216(b) provides that every common carrier of property by motor vehicle is required "to establish, observe, and enforce just and reasonable rates, charges, and classifications . . . ." Section 217(a), which deals with the publication of tariffs provides that "Every common carrier by motor vehicle shall file with the Commission . . . tariffs showing all the rates, fares, and charges for transportation. . . ." And Section 218(a) makes it "the duty of every contract carrier by motor vehicle to establish and observe reasonable minimum rates and charges . . ." and "to file with the Commission . . . schedules concerning the actual rate or charges . . . ."

Only in four instances did Congress give the Commission discretion to determine whether or not to regulate economically for-hire motor carriers subject to the provisions of Section 202(a). Those instances are where the carriers' operations are "wholly within a municipality or between contiguous municipalities or within a zone adjacent to and commercially a part of any such municipality, except when such transportation is under common control, management, or arrangement for a continuous

carriage to or from a point without such municipality, municipalities, or zone . . .";[9] where the transportation is casual, occasional, or reciprocal transportation by any person not engaged in transportation by motor vehicle as a regular occupation or business;[10] where the carrier is engaged in "the emergency transportation of any accidentally wrecked or disabled motor vehicle in interstate or foreign commerce by towing";[11] and where the carrier's operations are within a single state and are of such a nature as not to affect the Commission's regulation of transportation by motor carriers engaged in interstate commerce.[12] In all other instances, the Congress itself determined whether carriers subject to the provisions of Part II by virtue of Section 202 (a) were to be exempt or not from economic regulation. Congress carefully spelled out the exemptions in Sections 202(c) (1) and (2) and 203(b), pars. (1)-(7a). And nothing in those sections or in any other section of the Act suggests, much less provides, an exemption from economic regulation for for-hire carriers performing transportation in interstate commerce, wholly within the confines of a single state, because that transportation is one part of a continuous movement, the other part of which is performed by a private carrier.

Support for the Commission's authority to regulate economically the single-state, for-hire motor carriage involved can also be found in other provisions of Part II. For example, Section 206 (a) (1) requires motor carriers operating in interstate commerce within the confines of a single state to have a certificate from the Commission authorizing such operations. The rate sections of Part II

[9] Section 203(b)(8).

[10] Section 203(b)(9).

[11] Section 203(b)(10).

[12] Section 204(a)(4a).

apply to for-hire carriers operating in interstate commerce whether they are single-state operators or operate from coast to coast. And Section 204(a)(4a), as we just indicated, empowers the Commission to exempt from its economic regulation single-state carriers whose operations are not an important segment of interstate commerce. Thus, there can be no doubt that Congress meant single-state, for-hire carriers engaging in interstate commerce to be subject to the economic jurisdiction of the Commission. It is clear, too, that it is the interstate character of the overall commerce, not the physical operations of the for-hire carrier, that determines whether such transportation is subject to such regulation.

Since Congress expressly exempted transportation from the Commission's economic regulation when it deemed an exemption advisable, and since there is no exemption dealing with the involved for-hire carriage, it follows logically that Congress meant the Commission to have economic jurisdiction over such for-hire transportation. We submit, therefore, that the for-hire transportation here is "transportation . . . by motor carriers engaged in interstate commerce" as that commerce is defined in Section 203(a)(10); that Section 202(a) vests jurisdiction to regulate this transportation in the Interstate Commerce Commission; and that such jurisdiction includes authority to regulate it economically as provided in Part II.

2. The basis for the Commission's conclusion that the for-hire motor transportation under consideration is not in interstate commerce subject to its economic regulation is *Pennsylvania R. Co.* v. *Ohio Public Utilities Comm.*, *supra*, which case it considered controlling:

> The *Pennsylvania* case made it clear that not all commerce is transportation; that transportation begins only when merchandise has been placed in the possession of a carrier subject to economic regulation; and that a shipper is not a carrier subject to eco-

> nomic regulation under the provisions of what is now part I of the act. The fundamental principles of the *Pennsylvania* case are not altered in dealing with part II instead of part I. For although part II extends to proprietary operations for the purposes of regulating safety of operations and hours of service, it does not consider shippers to be subject to the act for the purposes of economic regulation. Thus under part II, just as under part I, the transportation must be considered as beginning at the point where the shipper tenders his goods to a for-hire carrier. If delivery is then made at a point in the same State, the relevant transportation is not interstate commerce.[13]

And the district court, in affirming the Commission's report and order, agreed with it that the *Pennsylvania* case was controlling. It stated:

> The Supreme Court held that Congress had not granted to the Commission jurisdiction to regulate the rates then in issue. In *Pennsylvania R. R. Co., supra*, the Court was considering Part I of the Interstate Commerce Act (49 U.S.C. §§ 1-26) and in the instant matter we are construing Part II of the Interstate Commerce Act (49 U.S.C. §§ 301-327). Nevertheless we feel, as did the Commission below [footnote omitted], that the logic of *Pennsylvania R. R. Co., supra*, is equally applicable to Part II, and that there are no sufficiently significant statutory differences to warrant a different result. Thus we affirm the order and holding of the Commission below.[14]

The pivotal point of this appeal is, therefore, the correctness of the application of the *Pennsylvania* case by the Commission and the district court. In that case, a coal producer used its own barges and tugs to transport its

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[13] Appendix C, p. 550.

[14] Appendix A, p. 3.

coal from a mine in Pennsylvania to another Pennsylvania point, thence over its own railroad right-of-way to its plant in Ohio where the coal was washed, broken, assorted, and, for the first time, made ready to fill specific orders. The coal was thereafter loaded on a common carrier railroad for delivery to points in Ohio. The controversy which arose from these facts was whether certain interstate charges on file with the Commission, under what is now Part I of the Act, applied to a portion of the coal movement by the common carrier railroad in Ohio. The Court held that the Act did not apply to the movement of the coal wholly within Ohio because it was not "that particular form of interstate commerce which Congress had subjected to regulation in respect of rates by a federal commission." It stated the matter this way:

> *The question for us here is not whether the movement of the coal is to be classified as commerce or even as commerce between states. The question is whether it is that particular form of interstate commerce which Congress has subjected to regulation in respect of rates by a federal commission. The Interstate Commerce Act . . . is aimed at common carriers exclusively (section 1(1,3), 49 U.S.C.A. § 1(1,3)), and not even at all these . . . .* Even though the activities are those of common carriers by rail, the statute does not apply "to the transportation of passengers or property . . . wholly within one State and not shipped to or from a foreign country from or to any place in the United States. (Emphasis supplied.)
>
> * * * *
>
> The only transportation of this coal by a common carrier of merchandise either by railroad or by water was intrastate transportation in Ohio between Negley and Youngstown.[15]

The *Pennsylvania* case differs from the one at hand in one major respect: the Court's decision in that case

[15] 298 U.S. at 174-175.

was based upon a jurisdictional question arising under Sections 1 (1) (a) and (2) (a) of Part I of the Interstate Commerce Act, whereas this proceeding involves a jurisdictional question under Sections 202 (a) and (b) of Part II.

Section 1 (1) of Part I provides:

> That the provisions of this part shall apply to common carriers engaged in—
>
> (a) The transportation of passengers or property wholly by railroad . . . .
>
> * * * *
>
> —from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States through a foreign country to any other place in the United States, or from or to any place in the United States to or from a foreign country, but only in so far as such transportation takes place within the United States.

It is readily apparent that Section 1 (1) does not make Part I applicable to all transportation by railroads engaged in interstate commerce. It is applicable only to transportation from one state to another physically performed by railroads that are common carriers. And to make this doubly plain, Section 1 (2) specifically provides that Part I "shall not apply—(a) To the transportation of passengers or property . . . wholly within one State . . ." unless such transportation is in foreign commerce. Accordingly, the Court held in the *Pennsylvania* case that the for-hire transportation by the railroad wholly within Ohio was not subject to economic regulation under Part I.

The for-hire transportation in this proceeding, however, is by a motor carrier, not a common carrier railroad, and

is subject to Section 202(a) which reflects a more comprehensive exercise of Congressional power to regulate interstate commerce than Congress evidenced by Section 1 (1)(a). Indeed, the Commission has held that by Section 202(a) the Congress exercised all of the power the commerce clause of the Constitution gives it. *Petroleum Transportation Within A Single State, supra,* 71 M.C.C. at 31. We pointed out previously that under Section 202 (a), *all* for-hire motor carriers engaged in interstate commerce, whether between points in different states or within the borders of a single state, are subject to the Commission's economic jurisdiction, unless expressly exempted from such regulation. And since there is no express exemption covering the instant for-hire transportation, it must be subject to the Commission's economic regulatory authority.

The Commission states in its report that the *Pennsylvania* case "made it clear. . . . that transportation begins only when merchandise has been placed in the possession of a carrier subject to economic regulation;[16] and that a shipper is not a carrier subject to economic regulation under the provisions of what is now part I of the act." The Commission then goes on to state that the fundamental principles of the *Pennsylvania* case are not altered in dealing with Part II, and that therefore "the transportation must be considered as beginning at the point where the shipper tenders his goods to a for-hire carrier."[17]

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[16] The Commission's statement should be contrasted with its position in *Air Dispatch, Inc.* v. *United States,* 237 F. Supp. 450 (1964). In that case the Commission vigorously (and successfully) defended its authority to regulate economically motor transportation that is a part of, but not incidental to, transportation by aircraft, notwithstanding that the former be performed within a single state and that the Commission has no authority whatever over the air segment of the movement. Substituting private motor carriage for the air carriage, we submit the situation presented here is essentially no different from what was before the court in the *Air Dispatch* case.

[17] Appendix C, p. 550.

The Commission is in error for two reasons. First, this Court did not establish any fundamental principles in the *Pennsylvania* case; it construed specific provisions of the Interstate Commerce Act. Secondly, the Court did not hold that no transportation in interstate commerce began until the property was placed in the possession of a carrier subject to economic regulation. Rather, it held that the portion of the transportation in interstate commerce which was performed by the for-hire carrier was not subject to regulation under Part I because Section 1(1) of that Part excluded from regulation all transportation in interstate commerce, except transportation from one state to another physically performed by railroads that are common carriers.

Plainly, the Commission and the district court have misapplied and misconstrued the *Pennsylvania* case in this proceeding and, contrary to their holdings, that case is not controlling. It is also plain that the involved for-hire transportation is subject to economic regulation by the Commission, and that the Commission and the district court erred, as a matter of law, in concluding otherwise.

3. In its report the Commission concludes that the single-state, for-hire transportation in question is intrastate commerce rather than interstate commerce "only in respect of economic regulation," but that there may be situations where the otherwise separate private movement across the state line and the for-hire intrastate movement may be combined in order to establish federal jurisdiction over the whole for purposes unrelated to economic control. It said:

> Although the instituting order herein states that the purpose of this proceeding is to determine if the involved for-hire transportation is interstate commerce subject to the Interstate Commerce Act, or if it is intrastate, we wish to emphasize that we have answered the first proposition in the negative and the

> second in the affirmative only in respect of economic regulation. It should be noted, however, that even though we think that the *Pennsylvania* decision does not permit the combination of for-hire transportation wholly within a single State with carriage by an owner across a State line for the purpose of subjecting the former to Federal economic regulation, there may in fact be situations where Congress has intended that the otherwise separate private interstate movement and the for-hire intrastate movement be combined in order to establish Federal jurisdiction over the whole for purposes unrelated to economic regulation. For example, compare *Walling* v. *Material Wholesale Food & Supply Co.*, 141 F. 2d 331, 337, 340 and *Feinman* v. *Philip Fleisher, Inc.*, 51 N.Y.S. 2d 31, which held to be subject to our jurisdiction under part II certain matters relative to the employment of drivers of private motor carriers operating within a single State in the transportation of traffic moving to or from such State in motor common carriage.[18]

Stated differently, the Commission has established a category of for-hire motor carriers whose operations are in intrastate commerce for purposes of economic regulation, yet may be in interstate commerce for other purposes, e.g., safety regulation.

We agree with the Commission that it has safety jurisdiction, under the fact situation presented here, over the private carrier operations which start the through movement of the goods, because those operations cross state lines, and that it has safety jurisdiction over the for-hire leg of the transportation which completes the interstate movement. But in order for the Commission to have safety jurisdiction over the for-hire leg of the through movement, that transportation must be in interstate commerce. The Commission, while admitting this, says, in

[18] *Id.*, pp. 550-551.

effect, that for purposes of safety regulation, the transportation involved must be viewed as one continuous movement (which it certainly is), but that for purposes of economic regulation the same transportation must be compartmentalized into two separate segments, i.e., one movement in private carriage, and one in for-hire carriage.

Aside from the obvious lack of logic in the Commission's reasoning, there is no support whatever in the language of the statute or its legislative history [19] for its position. Part II of the Interstate Commerce Act does not define transportation as being in interstate commerce for certain purposes and in intrastate commerce for other purposes. Section 202(a), as noted earlier, provides that, "The provisions of this part apply to the transportation of passengers or property by motor carriers engaged in interstate commerce . . . and the regulation of such transportation . . . is hereby vested in the Interstate Commerce Commission." It follows that if, as the Commission claims, the for-hire motor transportation is "not interstate transportation," or is "not in interstate commerce subject to economic regulation under part II," it is not subject to the Commission's authority to regulate safety of operations. In short, the involved for-hire transportation is either in interstate commerce for all purposes of the Act, or it is in intrastate commerce and subject to no provisions of the Act. The Commission cannot read Section 202(a) as conferring jurisdiction that it wants and as withholding jurisdiction that it does not want. The Commission's attempt to do so in this proceeding points up the inconsistency of its position and the fundamental error of its report.

4. Congress, by the Motor Carrier Act, 1935, preempted the regulation of for-hire motor carriers engaged

[19] In fact, there is no legislative history at all dealing with the precise fact situation presented here.

in transporting freight in interstate commerce. In fact, the only portion of the entire motor carrier field which Congress did not occupy is described in Section 202(b) and deals with intrastate transportation by for-hire motor carriers engaged exclusively in intrastate commerce, the regulation of such carriers being expressly delegated to the states.

In addition to the provisions of Section 202(b), statutory support for the view that the states are without power to regulate for-hire motor carriers operating in interstate commerce[20] is found in three sections of the Act which we have discussed previously: Section 202(a), which authorizes the Commission to regulate all for-hire motor carriers engaged in interstate commerce; Section 206(a)(1), which expressly requires single-state, for-hire motor carriers to obtain operating authority before performing such transportation; and Section 204(a)(4a), which authorizes the Commission to exempt from federal regulation motor carrier operations in interstate commerce which are confined to a single state provided they are "of such nature, character, or quantity as not substantially to affect or impair uniform regulation by the Commission of transportation by motor carriers engaged in interstate commerce . . . ." The latter section shows clearly the intent of Congress to regulate exclusively single-state, for-hire motor carriers engaged in interstate commerce. For Section 204(a)(4a) provides further that where such an exemption is granted, "it shall not be considered to be a burden on interstate or foreign commerce for a State to regulate such carrier with respect to the operations covered by such exemption." Thus, the states are without

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[20] Except for the limited delegation in § 206(a)(6), enacted in 1962, 79 Stat. 911, empowering the states to issue certificates which may be registered with the Commission for single-state interstate transportation. Even this limited state power, however, is subject to Commission veto under specified circumstances.

authority to regulate economically single-state, for-hire carriers, unless the federal government first withdraws from the field and delegates its power over such transportation to the states.

The doctrine that the states have no power to regulate economically for-hire motor carriers engaged in interstate commerce has been confirmed by the courts. In *Castle* v. *Hayes Freight Lines*, 348 U.S. 61(1954), Mr. Justice Black stated:

> Congress in the Motor Carrier Act adopted a comprehensive plan for regulating the carriage of goods by motor truck in interstate commerce. The federal plan of control was so all-embracing that former power of states over interstate motor carriers was greatly reduced. No power at all was left in states to determine what carriers could or could not operate in interstate commerce. Exclusive power of the Federal Government to make this determination is shown by § 306 of 49 U.S.C., 49 U.S.C.A. § 306 which describes the conditions under which the Interstate Commerce Commission can issue certificates of convenience and necessity.[21]

And the *Hayes* case was recently quoted by the district court in *Daniels* v. *United States*, 210 F. Supp. 942 (1962).[22] It said (pp. 950-951):

> As the Supreme Court said in *Castle* v. *Hayes Freight Lines, supra*, under the Motor Carrier Act of 1935 the federal plan of control over carriers engaged in interstate commerce was all embracing, including exclusive power in the federal government to determine what carriers could or could not engage in interstate commerce.

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[21] 348 U.S. at 63.

[22] Aff'd. *per curiam*, 372 U.S. 704(1963); compare also *Chicago* v. *Atchison, T. & S. F. R. Co.*, 357 U.S. 77(1958).

Another case in point is *State Corporation Commission* v. *Bartlett & Co. Grain*, 338 F. 2d 495(1964).[23] There grain was purchased by Bartlett at points in Kansas and transported by common, contract, and private motor carriers to its grain elevator at Kansas City, Kansas, where it was processed for resale to customers located outside of Kansas. While the grain company might have outstanding contracts for grain of certain grade or quality, no grain was purchased to fill any particular contract. Kansas attempted to assert its jurisdiction over the rates charged by the for-hire motor carriers carrying the grain to the elevator on the ground that the transportation was intrastate commerce. The trial court held that Congress by the Interstate Commerce Act exercised complete jurisdiction over such transportation, and no control of rates remained in the state regulatory system. The court of appeals affirmed the lower court's decision, holding that because the fixed and continuing intent of the terminal operator was to ship all the grain received at its terminal in interstate commerce, the short stopover at the elevator did not change the interstate character of the transportation. Noting that the transportation of the grain was exempt from economic regulation by the Commission under Section 203(b), the court concluded nevertheless that "the federal government by the Motor Carrier Act has preempted the regulation of the carriers here concerned, and the exception from regulation is to prevail as against the attempt made here by the state of Kansas to regulate the carriers hauling unprocessed grains."[24] Hence the rates were not subject to regulation by Kansas, even though the transportation involved was specifically exempted from federal economic regulation by the Act.

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[23] *Cert. denied*, 85 S. Ct. 1109(1965).

[24] 338 F. 2d at 499.

The Commission's finding that the for-hire transportation at issue is *not* in interstate commerce subject to economic regulation under Part II of the Act,[25] may well mean that such for-hire motor transportation will not be subject to any economic regulation whatsoever. This is because the states have no power to regulate for-hire motor carriers handling freight moving in interstate commerce since Congress has preempted this motor carriage by its passage of the Motor Carrier Act, 1935. The Commission's decision, therefore, may well result in a hiatus in the regulatory scheme by freeing from all economic regulation an important segment of the motor carrier industry. It is the prospect of this regulatory void that concerns these appellants.

The practical effect of the Commission's decision is that it will forfeit all control over the rates of single-state, for-hire movements under arrangements such as those involved here because Section 216(e) of the Act provides that the Commission shall have no power "to prescribe, or in any manner regulate, the rate, fare, or charge for intrastate transportation, or for any service connected therewith, for the purpose of removing discrimination against interstate commerce or for any other purpose whatever." Shippers who might otherwise use the services of regulated interstate motor carriers from plant site to destination would be encouraged to transport their freight to a point just within the boundary of the state to which the freight is destined for the exclusive purpose of avoiding both state and Commission control. There will be resort to all manner of devices and changes in form of operating practices by single-state motor carriers to escape regulation.

The federally regulated for-hire motor carriers have a statutory obligation under the Interstate Commerce Act to provide the day-to-day transportation service required

[25] Appendix C, pp. 550-551.

by the general shipping public. To meet this obligation, the carriers must have their equipment and personnel ready to meet any shipper's reasonable request for transportation, and their facilities must be available during periods of slack as well as peak demands for service. It is an expensive proposition for the owners of motor vehicles, many of whom operate on slim margins of profit, to meet their continuing responsibility to the shipping public, and any loss of traffic impairs their ability to do so. Accordingly, these appellants are vitally concerned with the issues in this proceeding. The Commission is, in effect, creating a class of motor carriers free of entry control and without any obligation to the public, who will be in a position to divert freight from the regulated carriers.

Besides the loss of traffic, these appellants are alarmed by the effect the Commission's decision will have in the field of safety. The Commission's finding that the for-hire transportation is in intrastate commerce, for economic purposes, raises serious questions as to its power to regulate such transportation for purposes of safety. As we pointed out before, transportation is either in interstate commerce for all purposes of the Act, or it is in intrastate commerce and subject to no provisions of the Act. If the Commission is correct that it lacks authority to regulate economically the for-hire carriage here involved because it is in intrastate commerce, then it logically follows that it also lacks authority to regulate such transportation respecting safety. There are certain to be conflicts between the Commission and the states as to their respective safety jurisdiction, and between the Commission and the Wage-Hour Division of the Department of Labor [26] re-

[26] Section 213 (1) of the Fair Labor Standards Act, 29 U.S.C. § 213 (b)(1), exempts from the overtime provisions of that law "any employee with respect to whom the Interstate Commerce Commission has qualifications and maximum hours of service pursuant to the provisions of section 304 of Title 49." See also, *United*

garding jurisdiction over employees of single-state truck operators. The shipping public, in turn, will ultimately pay the penalty resulting from such conflicts in the form of duplicative regulation.

Congress's national transportation policy is to provide for the "fair and impartial regulation of all modes of transportation . . . to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers . . .— all to the end of developing, coordinating, and preserving a national transportation system . . . adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense." We submit that the Commission's decision undermines that policy.

States v. *American Trucking Ass'ns*, 310 U.S. 534(1940); *Dallum* v. *Farmers Co-op Trucking Ass'n*, 46 F. Supp. 785(1942).

CONCLUSION

The questions presented by this appeal are substantial and of public importance. For the reasons stated, it is urged that jurisdiction be noted and that the judgment of the district court be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Peter T. Beardsley, one of the attorneys for appellants herein, and a member of the bar of the Supreme Court of the United States, hereby certify that, on the 30th day of August, 1965, I served copies of the foregoing document on the several parties hereto, as follows:

1. On the United States, by mailing copies in duly addressed envelopes, with postage prepaid, to The Solicitor General, Department of Justice, Washington, D.C. 20530; to Robert B. Hummel, Esq., Chief, Appellate Section, Antitrust Division, Department of Justice, Washington, D.C. 20530; and to Drew J. T. O'Keefe, Esq., United States Attorney, Eastern District of Pennsylvania, Philadelphia, Pennsylvania.

2. On the Interstate Commerce Commission, by mailing copies in duly addressed envelopes, with postage prepaid, to Robert W. Ginnane, Esq., General Counsel, and I. K. Hay, Esq., Deputy General Counsel, at the Offices of the Commission, Washington, D. C. 20423.

3. On The Pennsylvania Railroad Company, by mailing copies in duly addressed envelopes, with postage prepaid, to Carl Helmetag, Esq., Assistant General Counsel, and Carmine J. Liotta, Esq., 1138 Transportation Center, Six Penn Center Plaza, Philadelphia 4, Pa.

4. On South Paterson Trucking Co., Inc., and Private Carrier Conference, Inc., by mailing copies in duly addressed envelopes, with postage prepaid, to Joseph E. Keller, Esq., and William H. Borghesani, Jr., Esq., 1712 N Street, N. W., Washington, D. C. 20036.

5. On The National Industrial Traffic League, by mailing copies in duly addressed envelopes, with postage prepaid, to John F. Donelan, Esq., and William L. Slover, Esq., 888 - 17th Street, N. W., Washington, D. C.

6. On the Pennsylvania Public Utility Commission, by mailing copies in duly addressed envelopes, with postage prepaid, to Joseph C. Bruno, Esq., Chief Counsel, and William A. Goichman, Esq., Assistant Counsel, North Office Building, Harrisburg, Pennsylvania

PETER T. BEARDSLEY

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 36561

THE PENNSYLVANIA RAILROAD COMPANY

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION

Appeal From A Report and Order of the
Interstate Commerce Commission

Argued February 25, 1965

Before Freedman, Circuit Judge and
Kraft and Higginbotham, District Judges

OPINION OF THE COURT

(Filed April 23, 1965)

Per Curiam.

We are here asked to hold that the Interstate Commerce Commission must extend its economic regulation into certain areas pertaining to ". . . for hire motor transportation within the confines of a single state" [1]—even though

[1] Motor Transportation of Property Within A Single State, 94 MCC 541, 542 (1964). These proceedings were originally instituted

the Commission (by a majority)[2] has held that there is no statutory jurisdiction for the economic regulation of the type requested by petitioners. Little can be added to the careful analysis of the Commission's opinion, which notes the past dichotomies and conflicts between various divisions within the Commission, and the historical and statutory basis for its present legal conclusions.

Almost three decades ago in *Pa. R. R. Co.* v. *Public Utilities Commission*, 298 U.S. 170, 174 (1936), 56 S. Ct. 687, 688-89, Justice Cardozo spoke with clarity when noting that:

> "The question for us here is not whether the movement . . . is to be classified as commerce or even as commerce between states. *The question is whether it is that particular form of interstate commerce which Congress has subjected to regulation* in respect of rates by a federal commission." (Emphasis added.)

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by an Order of May 21, 1962, of the Interstate Commerce Commission noting that it desired to issue an "interpretive ruling" because there was ". . . a difference of opinion between divisions of the Commission as to whether transportation by for-hire motor carriers of property within a state of goods which have moved or will move to or from points outside the state by private motor carriers, the entire movement being continuous, is interstate commerce subject to the Interstate Commerce Act or whether it is intrastate transportation." The Commission further noted that on January 15, 1962, the South Paterson Trucking Co., Inc., of Paterson, New Jersey, had filed a petition seeking a declaratory order making ". . . definite and certain the application of Section 206(a) of the Act when merchandise is transported into a state in proprietary (private) carriage and is ultimately delivered to points in the same state by a for hire-carrier; and that it is desirable that the matter be considered and resolved by the Commission by the issuance of an interpretive ruling; . . ." Pursuant to the May 21, 1962 Order, thirty-seven statements were filed with the Commission noting the views of various interested rail and motor carriers, manufacturers, motor carrier associations, associations of manufacturers, state regulating commissions and other persons. After receipt of these briefs and statements, the Commission issued its opinion on March 2, 1964, MC-C3626, reported at 94 MCC 541 (1964).

[2] Four of the eleven Commissioners dissented.

The Supreme Court held that Congress had not granted to the Commission jurisdiction to regulate the rates then in issue. In *Pennsylvania R. R. Co., supra*, the Court was considering Part I of the Interstate Commerce Act (49 U.S.C. §§ 1-26) and in the instant matter we are construing Part II of the Interstate Commerce Act (49 U.S.C. §§ 301-327). Nevertheless we feel, as did the Commission below,[3] that the logic of *Pennsylvania R. R. Co., supra*, is equally applicable to Part II, and that there are no sufficiently significant statutory differences to warrant a different result. Thus we affirm the order and holding of the Commission below.

BY THE COURT:

/s/ Abraham L. Freedman
ABRAHAM L. FREEDMAN, Circuit Judge

/s/ C. William Kraft, Jr.
C. WILLIAM KRAFT, JR., District Judge

/s/ A. Leon Higginbotham, Jr.
A LEON HIGGINBOTHAM, JR., District Judge

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[3] In discussing the Pennsylvania case, supra, the Commission said: "The Pennsylvania case made it clear that not all commerce is transportation; that transportation begins only when merchandise has been placed in the possession of a carrier subject to economic regulation; and that a shipper is not a carrier subject to economic regulation under the provisions of what is now part I of the act. The fundamental principles of the Pennsylvania case are not altered in dealing with part II instead of part I. For although part II extends to proprietary operations for the purposes of regulating safety of operations and hours of service, it does not consider shippers to be subject to the act for the purposes of economic regulation. Thus under part II, just as under part I, the transportation must be considered as beginning at the point where the shipper tenders his goods to a for-hire carrier. If delivery is then made at a point in the same State, the relevant transportation is not interstate transportation." (94 MCC at 550.)

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 36561

THE PENNSYLVANIA RAILROAD COMPANY, ET AL.,
Plaintiffs,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Defendants.

FINAL JUDGMENT AND DECREE

The above-entitled action having come on for hearing on the merits on February 25, 1965, before a duly constituted district court of three judges convened pursuant to sections 2284 and 2325 of Title 28, United States Code, and the Court having considered the pleadings, the briefs, and the oral arguments of counsel, and having also considered the certified copy of the record made before the Interstate Commerce Commission in the proceeding under review, and being fully advised in the premises, and the Court having filed its opinion on April 23, 1965, in which it held valid and sustained the orders entered by the Commission on March 2, 1964, and August 5, 1964, in Docket No. MC-C-3626, *Motor Transportation of Property Within a Single State*, 94 M.C.C. 541, it is hereby

ORDERED, ADJUDGED AND DECREED that the relief prayed for in the complaint be, and it is hereby, denied and the complaint is dismissed, the plaintiffs to pay the costs.

Dated this 11th day of June, 1965.

ABRAHAM L. FREEDMAN
United States Circuit Judge

APPROVED:

C. WILLIAM KRAFT, JR.
United States District Judge

CARL HELMETAG, JR.
Attorney for Pennsylvania Railroad Co., Plaintiff

A. LEON HIGGINBOTHAM, JR.
United States District Judge

RALPH C. BUSSER, JR.
Attorney for American Trucking Associations, Inc. and National Motor Freight Traffic Association, Inc., Intervening Plaintiffs

V. BAKER SMITH
Attorney for Private Carrier Conference, Inc. of American Trucking Associations, Inc. and South Paterson Trucking Company, Inc., Intervening Defendants

Asst. United States Attorney

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Attorneys for United States of America, Defendant

THOMAS F. MOUNT
Attorney for the National Industrial Traffic League, Intervening Defendants

I. K. HAY
Attorney for Interstate Commerce Commission, Defendant

WILLIAM A. GOICHMAN
Attorney for Pennsylvania Public Utility Commission, Intervening Defendant

APPENDIX C

INTERSTATE COMMERCE COMMISSION

No. MC-C-3626

MOTOR TRANSPORTATION OF PROPERTY WITHIN A SINGLE STATE

Decided March 2, 1964

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1. For-hire motor transportation within a single State of property, which has moved or will move in private motor carriage from or to points beyond the single State, found not to be transportation in interstate commerce subject to economic regulation under part II of the Interstate Commerce Act.

2. *Hafner and Hanson Common Carrier Application*, 69 M.C.C. 581, *Eldon Miller, Inc., Extension—Illinois*, 63 M.C.C. 313, *Dora Motor Carrier Operations Within Arizona*, 48 M.C.C. 171, *Bisceglia Contract Carrier Application*, 34 M.C.C. 233, and *Roethlisberger Transfer Co. Ext.—Frankenmuth, Mich.*, 32 M.C.C. 709, and other cases of similar import, to the extent inconsistent with the discussion herein, overruled.

William M. Bennett, Mary M. Pajalich, and *Donald B. Day* for the Public Utilities Commission of the State of California.

John G. Feehan for the Maine Public Utilities Commission.

Tyre W. Burton, Chairman, *E. L. McClintock*, *William Barton*, *Frank J. Iuen*, and *Frank W. May*, Commissioners, for the Missouri Public Service Commission.

George J. Griffin for the Public Utilities Commission of the State of Connecticut.

John Block, Jr., Chairman, *G. Y. Fails*, and *Ingram B. Pickett*, Commissioners, and *L. C. Cypert* for the State Corporation Commission of New Mexico.

Kent H. Brown for the New York State Public Service Commission.

T. G. Killian for the North Carolina Utilities Commission.

William C. Seibert for the State Corporation Commission, Commonwealth of Virginia.

W. E. Aebischer, *Lelland M. Cowan*, *J. F. Edell*, *Roy L. Eyster*, *W. R. Fleming*, *R. E. Gifford*, *Carl Helmetag, Jr.*, *Paul H. Johansen*, *Al Kochka, Jr.*, *Carll V. Kretsinger*, *Tom B. Kretsinger*, *L. M. Lewis*, *Hugh T. Matthews*, *Harry McChesney, Jr.*, *M. L. Owens*, *R. Y. Schureman*, *John Harmon Vickers*, *C. E. Walker*, *John Scala*, *John M. Zachara*, *Peter T. Beardsley*, *William J. O'Brien, Jr.*, *W. H. Borghesani, Jr.*, *Joseph E. Keller*, *Harry C. Maxwell*, *Frederick A. Babson, Jr.*, *John C. White*, *William A. Quinlan*, *C. A. Pascarella*, *Charles A. Washer*, *John F. Donelan*, *Dickson R. Loos*, *John M. Cleary*, *Austin L. Roberts*, *Paul V. Miller*, *J. M. Collins*, *Angus M. Holmes*, *Jerome Hewitt*, and *D. E. Burnham* for various carriers, persons, and associations filing representations.

REPORT OF THE COMMISSION

BY THE COMMISSION:

This proceeding was instituted by order of May 21, 1962, for the purpose of determining if for-hire motor transportation, within the confines of a single State, of

property which has moved from, or will move to, points beyond the same State in private carriage, the entire movement being continuous, is, so far as the for-hire transportation is concerned, interstate commerce subject to the Interstate Commerce Act, including those sections thereof applicable to the economic regulation of motor carriers engaged in for-hire transportation in interstate commerce; or if the for-hire motor carriage is a movement in intrastate commerce. Underlying the institution of this proceeding is a difference of opinion that has developed between divisions of this Commission with respect to the question presented; division 1 and former division 5 concluding that the for-hire portion of the type of movement generally described above may, if the facts so warrant, be in interstate commerce within the meaning of part II of the act and subject to the operating rights provisions thereof, and division 2 concluding in proceedings before it that such for-hire transportation is not in interstate commerce within the meaning of part II and is not subject to the rate provisions of that part. In our order of May 21, 1962, we noted that a petition had been filed by South Paterson Trucking Co., Inc., seeking a declaratory order with respect to its for-hire motor carrier operations within the State of New Jersey when preceded by a movement in private carriage from a point outside New Jersey. Our order provided for participation by interested persons through the submission of written statements of their facts, views, and arguments. Thirty-seven such statements have been received, accounting for the participation of 46 interested rail and motor carriers, manufacturers, motor carrier associations and associations of manufacturers, State regulatory Commissions, and other persons,[1]

[1] *Motor carriers:* South Paterson Trucking Co., Inc., Blue & Gray Transportation Co., Inc., Be-Mac Transport Co., Inc., Hess Cartage Company, Butler-Newark Daily Delivery, Inc., J. L. Cox & Son, Inc., Parkhill Truck Company, J. O. (Red) Willett Pipe Line Stringing Corporation, Dunn Bros., Inc., Ecklar-Moore Express, Inc., Arnold Lignon Truck Lines, Inc., McDuffee Motor Freight, Inc., Cumber-

all of whom and which shall hereinafter be called by appropriate short titles.

FACTUAL SITUATION

Although not all of the statements filed describe completely the facts to which they allude, the majority of the representations dealing factually with the situation described in the instituting order herein present a basic picture of the circumstances which do or may prevail in the performance of the transportation under consideration. This transportation consists generally of small shipments consolidated into truckload quantities by a shipper for proprietary movement to a terminal or other facility of a for-hire motor carrier for sorting and distribution by the latter throughout a single State. The merchandise is sometimes distributed without delay, and at other times is held and integrated into a carrier's distribution schedule. Bills of lading are issued to the shipper (through the driver of the proprietary motor vehicle) at the point the freight is tendered to the for-hire carrier for distribu-

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land Motor Freight, Inc., Sutton Transfer, Inc., Roadway Express, Inc., Campbell's Service, National Trailer Convoy, Inc., and Dixie Ohio Express, Inc.

Motor carrier associations: Joint Northeastern Motor Carrier Association, Inc., National Motor Freight Traffic Association, Inc., American Trucking Associations, Inc., Private Truck Council of America, Inc., Private Carrier Conference, Inc., of American Trucking Associations, Inc., and the Private Truck Owners Conference of the Empire State Highway Transportation Association, Inc.

Rail carriers: The Pennsylvania Railroad Company and the Chicago, Rock Island and Pacific Railroad Company.

Manufacturers: Western Electric Company, Incorporated, Bethlehem Steel Company, Great Atlantic and Pacific Tea Company, Inc., Ford Motor Company, Montgomery Ward & Co., Incorporated, and Royal Crown Cola Co.

Manufacturer associations: American Retail Federation and the National Industrial Traffic League.

State commissions: California, Missouri, Maine, Virginia, North Carolina, New York, New Mexico, and Connecticut.

Others: Lelland M. Cowan and the National Association of Railroad and Utilities Commissioners.

tion, with the bill of lading showing the transfer point as the origin of the shipment. In all instances the for-hire carrier deals directly with the shipper and the ultimate destination of the goods shipped is known to the shipper at the time the goods begin their journey.

In addition to all-motor movements, examples are described in which freight moves across State boundaries in private transportation by water, followed by distribution within a single State by a for-hire motor carrier. We are asked to direct our conclusions herein to such operations as well as those specifically covered by the order instituting this proceeding. Inasmuch as our order of May 21, 1962, referred to all-motor operations only, we shall confine our conclusions to the situation in which motor carriage alone is involved.

Position of the Parties

The representations submitted in this proceeding are almost equally divided between those that support the view that the for-hire portion of the transportation under consideration is subject to full economic regulation under part II of the act; and those that reach the opposite view. However, two participants, Hess and the American Retail Federation, find no conflict in interpretative decisions affecting operating rights and rate matters arising under part II of the act. More particularly, all of the motor common carrier participants, except Hess, Central Motor Lines, and South Paterson Trucking; both railroad parties; Cowan; the Joint Northeastern Motor Carriers; the National Motor Freight Assn.; and the ATA favor the "interstate" view; i.e., that the for-hire one-State motor operation is subject to full economic regulation by this Commission, while South Paterson and Central Motor Lines, all of the State commissions, NARUC, the manufacturers, and, with the exception of the American Retail Federation, the manufacturer associations and private motor carrier associations take the "intrastate" position.

The American Retail Federation urges that, pursuant to section 204(a)(4a) of the act, we determine that the for-hire operations involved are not of such nature as to impair the uniform regulation of transportation subject to our jurisdiction, and that we issue a general certificate of exemption therefor.

Essentially, the arguments of those who oppose economic regulation by this Commission of the invloved for-hire transportation are: (1) that the applicable judicial precedents do not allow the inclusion of the private carrier portion of the interstate movement as part of the total movement to be considered in determining if the economic provisions of part II of the act apply to the for-hire portion of the movement; in other words, that for this purpose there is no "continuous" movement between a private and for-hire carrier, and that transportation, for the purpose of determining its inter- or intrastate character, exists only when merchandise is in the hands of a for-hire carrier; (2) that a contrary conclusion would be impractical and unduly burdensome on single-State for-hire carriers as they would have no way of knowing whether a shipment tendered to them by a private carrier actually originated at a point in another State; and (3) that the Congress did not intend a broad or implied construction of the act on issues involving Federal as opposed to State jurisdiction.

The arguments supporting a finding that the involved for-hire transportation is within our jurisdiction are: (1) that part II of the act is applicable to both private and for-hire carriers, and the private movement should be joined with a for-hire movement when ascertaining whether or not a shipment is in interstate commerce subject to regulation under part II; (2) that, in view of the absence in some States of effective regulatory action over motor intrastate transportation of property, the economic regulation by us of the for-hire transportation in issue

here will serve to strengthen the motor carrier industry generally; and (3) that, under accepted precedents concerned with the interstate versus intrastate nature of commerce, the for-hire portion of the involved movements are in interstate commerce, beyond the jurisdiction of the States; and should we find that such for-hire service is not within the regulatory purview of the Interstate Commerce Act, there would be created thereby, to the detriment of all concerned, a regulatory void.

HISTORIAL BACKGROUND

Generally, the type of problem before us exemplified by the decision of the Supreme Court in *Pennsylvania R. Co.* v. *Ohio Public Utilities Comm.*, 298 U.S. 170 (1936), hereinafter called the *Pennsylvania* case. In that case, a coal producer used its own barges and tugs to transport its own coal from a mine in Pennsylvania to another Pennsylvania point, thence over its own rail right-of-way to a plant of the producer at an Ohio point where the coal was washed, broken, assorted, and "for the first time it is ready to fill specific orders." The coal thereafter was loaded on a common carrier railroad for delivery to points in Ohio. The controversy which arose from the foregoing factual situation was whether certain interstate charges on file with us under what is now part I of the act should apply to a portion of the coal movement by common carrier railroad within Ohio. The Court, in reaching the conclusion that such transportation was not within our jurisdiction for the purpose of prescribing rates, stated, as follows (citations omitted):

> Appellants say that from the moment the coal left the mines in Pennsylvania there was a continuing intention to deliver it to consumers in another state, whether their identity at the beginning was known or unknown, and that a movement impelled by that intention is interstate commerce which Congress has the power to regulate at any stage of the ensuing

transit. * * * But there is confusion of thought in such a statement of the problem. Not all commerce is transportation, and not all transportation is by common carriers by rail. The question for us here is not whether the movement of the coal is to be classified as commerce or even as commerce between states. The question is whether it is that particular form of interstate commerce which Congress has subjected to regulation in respect of rates by a federal commission. The Interstate Commerce Act * * * is aimed at common carriers exclusively, § 1(1), (3), and not even at all these. * * * For many purposes, as for example in testing the validity of state taxation, merchandise is deemed to be in interstate commerce when it has started on its journey, though still in the possession of consignor or seller. * * * Not so, however, in determining the application of this act. Transportation begins for that purpose, if not for others, when the merchandise has been placed in the possession of a carrier. * * * And "wherever the word 'carrier' is used in this chapter it shall be held to mean 'common carrier.'" § 1(3). * * * Appellants would have us hold that this interstate transportation by an owner who does not carry for any one else will be tacked to the intrastate transportation by railroads who are in business as common carriers, and the movement thus consolidated brought within the statute. The statute and the decisions as we read them forbid this unifying process.

* * * *

Neither in the cases cited by the appellants nor in any others known to us has transportation by a common carrier been combined with carriage by an owner for the purpose of subjecting the whole to the operation of the statute when the parts would be exempt. Such a fusion, if permitted, would lead to strange results. The situation laid before us would not be changed in its essentials if a cooperative association of farmers doing business in Pennsylvania close to the state line were to use a fleet of trucks

belonging to the association or its members to carry milk or vegetables from Pennsylvania to a railroad station in Ohio. Even though this were done systematically and not casually or in sporadic instances, the ensuing transportation by rail, if kept within Ohio, would not be transportation between the states within the meaning of the Act of Congress. If the concept of transportation is in need of expansion, it is for the legislative department of the government to determine how great the change shall be.

We have found it unnecessary to consider in the disposition of the case whether the treatment of the coal at * * * [the plant] would break the continuity of the movement from the mines, even if interstate transportation would otherwise exist.

Subsequent to the *Pennsylvania* decision, a series of reports involving not rate matters but operating rights found, in effect, that part II of the act differed from part I with respect to the transportation that could be viewed in establishing, for purposes of economic regulation, the interstate character of a for-hire motor movement within a single State, the movement being preceded or followed by a private movement across the State line. In *Bisceglia Contract Carrier Application*, 34 M.C.C. 233, former division 5 stated:

The provisions of part II of the act apply to "the transportation of passengers or property by motor carriers engaged in interstate or foreign commerce." Section 202(a). For the purposes of part II, the term "interstate commerce" includes—

"commerce between any place in a State and any place in another State or between places in the same State through another State, whether such commerce moves wholly by motor vehicle, or partly by motor vehicle and partly by rail, express, or *water*. [Section 203(a) (10).] [Emphasis supplied.]"

In the instant proceeding, the water carrier does not carry for anyone else, and unless the transporta-

tion performed by it may be tacked to that performed by motor vehicle, the transportation is not interstate in character within the meaning of part II of the act. Section 203(a)(10) does not expressly state that, in order to be so unified, both parts of the interstate movement must be performed by carriers operating for hire; nor, in our opinion, is that interpretation required by necessary implication * * *.

We are not unmindful of the decision of the Supreme Court in *Pennsylvania R. Co.* v. *Public Utilities Comm. of Ohio*, 298 U. S. 170. That decision, however, involved part I of the act. The Court expressly stated that the question there in issue was not whether the movement was interstate in character but, rather, whether it was "that particular form of interstate commerce which Congress has subjected to regulation" under part I of the act. It was pointed out that part I "is aimed at common carriers exclusively," and that, because both parts of the movement there examined were not performed by common carriers, the transportation wholly within Ohio by the rail common carriers there involved did not come within the purview of part I.

The *Bisceglia* decision was followed in *Dora Motor Carrier Operations Within Arizona*, 48 M.C.C. 171; *Eldon Miller, Inc., Extension—Illinois*, 63 M.C.C. 313; and *Hafner and Hanson Common Carrier Application*, 69 M.C.C. 581. Compare, also, *Roethlisberger Transfer Co. Ext.—Frankenmuth, Mich.*, 32 M.C.C. 709, in which a similar result was reached without reference to the *Pennsylvania* case.

At the same time that these reports found a combination private and for-hire movement to be "interstate" and the for-hire portion subject to economic regulation, division 2, in a series of reports, adhered to the view that single-State motor transportation of the type here involved was not subject to rate regulation. In *Service Transp. Co. Contracts and Agreements*, 44 M.C.C. 419,

two motor private carriers, one of which originated traffic at Philadelphia, Pa., and the other at Trenton, N.J., tendered freight to Service, a regulated for-hire carrier, at Secaucus, N. J., a point within the New York, N. Y., commercial zone, for delivery by Service at other points within the New York, N. Y., commercial zone. The question raised was whether the transportation by Service was subject to the full regulatory jurisdiction of the Commission, or partially exempt from regulation under section 203(b)(8), which exempts from economic regulation transportation which, although it is in interstate or foreign commerce, is of a distinctly local nature, "except when such transportation is under a common control, management, or arrangement for a continuous carriage or shipment * * *." In concluding that the transportation performed by Service came within the exemption of section 203(b)(8) and was not subject to economic regulation under part II, division 2 stated:

> A careful reading of the pertinent provisions of the act reveals that part II applies to the "transportation" of passengers or property by motor carriers, engaged in interstate or foreign commerce, and that the term "motor carrier" includes private carriers of property by motor vehicle in the administration of only certain specifically designated sections of part II * * *. In view of the clear restriction of our jurisdiction over private carriers to matters of safety of operation and in the face of the longstanding interpretation of the phrase "under common control, management, or arrangement for a continuous carriage or shipment" as not embracing arrangements made by the shipper separately with two or more carriers acting independently, we are persuaded that the act does not contemplate the inclusion of a purely private carriage as part of the continuous carriage covered by that phrase.
>
> * * * * *

> While the situation [In the Pennsylvania case], so far as the character of the transportation was concerned, was very similar to that involved here, there are differences both in fact and in the applicable provisions of law, which might possibly be interpreted as taking this matter outside the purview of that decision of the court. Nevertheless, we are persuaded that, in the absence of a clearer evidence of a contrary Congressional intent, we should follow the doctrine of that case that a transportation by common carrier may not be "combined with carriage by an owner for the purpose of subjecting the whole to the operation of the statute when the parts would be exempt."

In *Iron and Steel Articles, Central Territory*, 53 M.C.C. 769, an investigation covering the lawfulness of certain proposed motor rates, division 2 followed the reasoning applied in the *Service* report; and, in *W. J. Holliday & Co., Inc.* v. *Liberty Trucking Co.*, 53 M.C.C. 22, a rate proceeding involving similar issues, it concluded that, in essence, since the term "motor carrier" does not include private carriers for purposes of rate and tariff matters, the Commission's limited jurisdiction over private carriers (for purposes of safety of operations) does not bring the for-hire service conducted wholly within a single State within the purview of the act "for the purpose of subjecting the whole to the operation of the statute when the parts would be exempt."

Thus, the decisions of divisions of this Commission arising under part II of the act may be summarized as requiring operating authority for the for-hire single-State portion of a motor movement that has originated in another State and has crossed or will cross a State line in private motor carriage, while, at the same time finding to be inapplicable an interstate motor tariff covering the single-State for-hire part of an identical movement.

Discussion and Conclusions

The representations filed by the parties indicate that our decision here is a matter of concern to significant segments of the shipping public and the motor carrier industry. It is argued, for example, that intrastate rates are generally lower than interstate rates for similar movements conducted under an interstate tariff. Or it is contended that, under the view that the involved for-hire transportation is intrastate, many shippers, who might use the services of regulated interstate motor carriers from plant site to destination, are encouraged to transport their own goods to a point just within the boundaries of the State to which their goods are destined for the purpose of avoiding interstate regulation.

In many situations involving questions of interstate versus intrastate commerce, the governing tests are clear. For example, it has long been established that for-hire motor transportation by one carrier within the confines of a single State, when preceded or followed for-hire transportation by another carrier across a State line, may be transportation in interstate commerce subject to economic regulation under part II of the act. *Rush Common Carrier Application*, 17 M.C.C. 661. Generally, whether transportation within a single State, is, in fact, interstate is determined by the essential character of the commerce, the most important factor of which is the presence or absence of a fixed and persisting intent of the shipper that his goods move to a destination in another State. *Baltimore & O. S. W. R. Co.* v. *Settle*, 260 U. S. 166.

Certain of the participants argue that we need only apply to the situation presented here the tests established in the *Settle* case in order to determine that the "essential character" of the commerce is interstate. Others argue that, since the term "interstate commerce" contained in section 202(a) is defined in section 203(a)(10) as "commerce * * * wholly by motor vehicle" between States, the

for-hire transportation here involved is subject to economic regulation under part II because it is a part of "commerce" which has moved wholly by motor vehicle. Solutions such as these, however, assume that the essentially interstate character of the overall commerce will alone determine the scope of transportation regulation, and we do not think that such an assumption is proper. The *Pennsylvania* case made it clear that not all commerce is transportation; that transportation begins only when merchandise has been placed in the possession of a carrier subject to economic regulation; and that a shipper is not a carrier subject to economic regulation under the provisions of what is now part I of the act. The fundamental principles of the *Pennsylvania* case are not altered in dealing with part II instead of part I. For although part II extends to proprietary operations for the purposes of regulating safety of operations and hours of service, it does not consider shippers to be subject to the act for the purposes of economic regulation. Thus under part II, just as under part I, the transportation must be considered as beginning at the point where the shipper tenders his goods to a for-hire carrier. If delivery is then made at a point in the same State, the relevant transportation is not interstate transportation.

Although the instituting order herein states that the purpose of this proceeding is to determine if the involved for-hire transportation is in interstate commerce subject to the Interstate Commerce Act, or if it is intrastate, we wish to emphasize that we have answered the first proposition in the negative and the second in the affirmative only in respect of economic regulation. It should be noted, however, that even though we think that the *Pennsylvania* decision does not permit the combination of for-hire transportation wholly within a single State with carriage by an owner across a State line for the purpose of subjecting the former to Federal economic regulation, there may in fact be situations where Congress has in-

tended that the otherwise separate private interstate movement and the for-hire intrastate movement be combined in order to establish Federal jurisdiction over the whole for purposes unrelated to economic regulation. For example, compare *Walling* v. *Material Wholesale Food & Supply Co.*, 141 F. 2d 331, 337, 340 and *Feinman* v. *Philip Fleisher, Inc.*, 51 N.Y.S. 2d 31, which held to be subject to our jurisdiction under part II certain matters relative to the employment of drivers of private motor carriers operating within a single State in the transportation of traffic moving to or from such State in motor common carriage.

We agree with the results of the *Service* case, *supra*, and the decisions of division 2 cited herein. To the extent that the cited decisions of division 1 and former division 5 are inconsistent with the conclusions reached herein, they are overruled.

FINDINGS

We find (1) that for-hire motor transportation, within the confines of a single State, of property which has moved from, or will move to, points beyond the same State in private motor carriage, is, so far as the for-hire transportation is concerned, not in interstate commerce subject to economic regulation under part II of the Interstate Commerce Act, and (2) that the conclusions and findings in *Hafner and Hanson Common Carrier Application*, 69 M.C.C. 581; *Eldon Miller, Inc., Extension—Illinois*, 63 M.C.C. 313; *Dora Motor Carrier Operations Within Arizona*, 48 M.C.C. 171; *Bisceglia Contract Carrier Application*, 34 M.C.C. 233; and *Roethlishberger Transfer Co. Ext.—Frankenmuth, Mich.*, 32 M.C.C. 709, and other cases of similar import, to the extent that they are inconsistent with the discussion contained herein should be, and they are hereby, overruled.

An order will be entered discontinuing the proceeding.

COMMISSIONER FREAS, whom COMMISSIONERS HUTCHINSON, HERRING, and BUSH join, dissenting:

The decision of the Supreme Court in *Pennsylvania Railroad Co.* v. *Ohio Public Utilities Commission*, 298 U. S. 170 (1936), upon which the majority relies, was based upon a jurisdictional question strictly within the confines of sections 1(1)(a) and (2)(a) of part I, of the act, whereas here we are confronted with a jurisdictional question within the purview of section 202(a) and (b) of part II. In the *Pennsylvania* case, the Court expressly stated that the issue was not whether the movement was interstate in character but rather whether it was "that particular form of interstate commerce which Congress has subjected to regulation" under part I, which is "aimed at common carriers exclusively." The Court reasoned that since both parts of the movement there examined were not performed by common carriers, that performed by the rail common carrier did not come within the purview of part I. No question was presented in the *Pennsylvania* case respecting economic regulation under part II.

Part II contains no restrictive grant of jurisdiction over common carriers as does part I, but rather the jurisdiction conferred by section 202(a) of part II is over "the transportation of passengers or property by motor carriers engaged in interstate or foreign commerce." Section 203(a)(10) defines "interstate commerce" as "commerce between any place in a State and any place in another State or between places in the same State through another State, whether such commerce moves wholly by motor vehicle or partly by motor vehicle and partly by rail, express, or water; * * *." And the term "motor vehicle" is defined by section 203(a)(13) as "any vehicle * * * propelled or drawn by mechanical power and used upon the highways in transportation of passengers or property * * *."

Although our part II jurisdiction over private carriers is limited to matters involving safety of operation and

hours of service, the operations of private carriers are, nevertheless, subject to the same definition of interstate commerce as are the operations of common and contract carriers. This is obviously true since the section 203(a)(17) definition of a private carrier specifies that such carrier must be one which operates in interstate or foreign commerce; and there is only one definition of interstate commerce contained in part II, namely that in section 203(a)(10). It is plain, therefore, that the test under part II is whether the essential character of the commerce concerned is interstate. In my opinion, it is.

The Commission's decision in *Service Transp. Co. Contracts and Agreements*, 44 M.C.C. 419, also relied on strongly by the majority, is distinguishable from the situation presented herein because in that case a purely local service was involved and thus the for-hire carrier was entitled to the exemption of section 203(b)(8).

Clearly, section 216 of the act and related sections dealing with rates and tariffs apply only to common carriers. While the statute does not provide for the publication or collection of through rates or charges covering a single arrangement between carriers other than common carriers, the collection of interstate rates by a common carrier covering its portion alone of a continuous interstate movement initiated or terminated by a private motor carrier obviously is mandatory. It is my opinion that to the extent the cited decisions of division 2 imply or require a contrary result, they should be overruled.

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 2nd day of March A. D. 1964.

No. MC-C-3626

MOTOR TRANSPORTATION OF PROPERTY WITHIN A SINGLE STATE

Investigation of the matters and things involved in this proceeding having been made, and the Commission, on the date hereof, having made and filed a report herein containing its findings of fact and conclusions thereon, which report is hereby made a part hereof:

It is ordered, That this proceeding be, and it is hereby discontinued.

By the Commission.

HAROLD D. McCOY
Secretary.

(SEAL)

APPENDIX D

SERVICE DATE
AUGUST 18, 1964

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 5th day of August, A. D. 1964.

No. MC-C-3626

MOTOR TRANSPORTATION OF PROPERTY WITHIN A SINGLE STATE

Upon consideration of the record in the above-entitled proceeding, and of:

(1) Joint petition of Morgan Drive-away, Inc., and National Trailer Convoy, Inc., filed April 15, 1964, for reconsideration;

(2) Petition of National Motor Freight Traffic Association, Inc., filed April 16, 1964, for reconsideration;

(3) Petition of American Trucking Associations, Inc., filed April 16, 1964, for reconsideration;

(4) Petition of The Pennsylvania Railroad Company, filed April 16, 1964, for reconsideration;

(5) Reply by Bethlehem Steel Company, filed May 4, 1964, to petitions in (1) through (4) above;

(6) Reply by South Paterson Trucking Company, Inc., filed May 5, 1964, to petitions in (1) through (4) above;

(7) Reply by American Retail Federation, filed May 6, 1964, to petitions in (1) through (4) above;

(8) Reply by North Carolina Utilities Commission, filed May 6, 1964, to petitions in (1) through (4) above;

(9) Reply by The National Industrial Traffic League, filed May 6, 1964, to petitions in (1) through (4) above;

(10) Reply by The Private Carrier Conference of the American Trucking Associations, Inc., filed May 6, 1964, to petitions in (1) through (4) above;

(11) Reply by Private Truck Council of America, Inc., filed May 6, 1964, to petitions in (1) through (4) above;

(12) Reply by National Association of Railroad and Utilities Commissioners, filed May 6, 1964, to petitions in (1) through (4) above;

and good cause appearing therefor:

It is ordered, That the said petitions be, and they are hereby, denied, for the reason that the findings of the Commission, in its report of March 2, 1964, are in accordance with the evidence and the applicable law.

By the Commission.

HAROLD D. MCCOY,
Secretary.

(SEAL)

APPENDIX E

THE INTERSTATE COMMERCE ACT

NATIONAL TRANSPORTATION POLICY

[*September 18, 1940.*] [*49 U.S.C., preceding §§ 1, 301, 901, and 1001.*] It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

Part I

Title 49.—Chapter 1, U. S. Code

REGULATION IN GENERAL; CAR SERVICE; ALTERATION OF LINE

SEC. 1. [*As amended June 29, 1906, April 13, 1908, June 18, 1910, May 29, 1917, August 10, 1917, February 28, 1920, June 19, 1934, August 9, 1935, September 18,*

1940, June 24, 1948, August 2, 1949, August 12, 1958.] [*49 U.S.C. § 1.*]

(1) That the provisions of this part shall apply to common carriers engaged in—

(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment;

* * * *

—from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States through a foreign country to any other place in the United States, or from or to any place in the United States to or from a foreign country, but only in so far as such transportation takes place within the United States.

(2) The provisions of this part shall also apply to such transportation of passengers and property, but only in so far as such transportation takes place within the United States, but shall not apply—

(a) To the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one State and not shipped to or from a foreign country from or to any place in the United States as aforesaid, except as otherwise provided in this part;

* * * *

PART II

Title 49.—Chapter 8, U. S. Code

APPLICATION OF PROVISIONS

SEC. 202. [*August 9, 1935, amended September 18, 1940, May 16, 1942.*] [*49 U. S. C. § 302.*] (a) The provisions of this part apply to the transportation of passengers or property by motor carriers engaged in interstate or foreign commerce and to the procurement of and the provision of facilities for such transportation, and the regulation of such transportation, and of the procurement thereof, and the provision of facilities therefor, is hereby vested in the Interstate Commerce Commission.

(b) Nothing in this part shall be construed to affect the powers of taxation of the several States or to authorize a motor carrier to do an intrastate business on the highways of any State, or to interfere with the exclusive exercise by each State of the power of regulation of intrastate commerce by motor carriers on the highways thereof.

(c) Notwithstanding any provision of this section or of section 203, the provisions of this part, except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation and equipment, shall not apply—

(1) to transportation by motor vehicle by a carrier by railroad subject to part I, or by a water carrier subject to part III, or by a freight forwarder subject to part IV, incidental to transportation or service subject to such parts, in the performance within terminal areas of transfer, collection, or delivery services; but such transportation shall be considered to be and shall be regulated as transportation subject to part I when performed by such carrier by railroad, as transportation subject to part III when performed by such water carrier, and as trans-

portation or service subject to part IV when performed by such freight forwarder;

* * * * *

DEFINITIONS

SEC. 203. [*August 9, 1935, amended June 23, 1938, June 29, 1938, September 18, 1940, September 1, 1950, July 9, 1952, July 22, 1954, August 3, 1956, August 22, 1957, August 12, 1958.*] [*49 U. S. C. § 303.*] (a) As used in this part—

* * * * *

(10) The term "interstate commerce" means commerce between any place in a State and any place in another State or between places in the same State through another State, whether such commerce moves wholly by motor vehicle or partly by motor vehicle and partly by rail, express, or water.

* * * * *

(13) The term "motor vehicle" means any vehicle, machine, tractor, trailer, or semitrailer propelled or drawn by mechanical power and used upon the highways in the transportation of passengers or property, or any combination thereof determined by the Commission, but does not include any vehicle, locomotive, or car operated exclusively on a rail or rails, or a trolley bus operated by electric power derived from a fixed overhead wire, furnishing local passenger transportation similar to street-railway service.

(14) The term "common carrier by motor vehicle" means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, whether over regular or irregular routes, except transportation by motor vehicle by an express company to the

extent that such transportation has heretofore been subject to part I, to which extent such transportation shall continue to be considered to be and shall be regulated as transportation subject to part I.

(15) The term "contract carrier by motor vehicle" means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (other than transportation referred to in paragraph (14) and the exception thereto), under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer.

* * * *

(b) Nothing in this part, except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment shall be construed to include (1) motor vehicles employed solely in transporting school children and teachers to or from school; or (2) taxicabs, or other motor vehicles performing a bona fide taxicab service, having a capacity of not more than six passengers and not operated on a regular route or between fixed termini; or (3) motor vehicles owned or operated by or on behalf of hotels and used exclusively for the transportation of hotel patrons between hotels and local railroad or other common carrier stations; or (4) motor vehicles operated, under authorization, regulation, and control of the Secretary of the Interior, principally for the purpose of transporting persons in and about the national parks and national monuments; or (4a) motor vehicles controlled and operated by any farmer when used in the transportation of his agricultural (including horticultural) commodities and prod-

ucts thereof, or in the transportation of supplies to his farm; or (5) motor vehicles controlled and operated by a cooperative association as defined in the Agricultural Marketing Act, approved June 15, 1929, as amended, or by a federation of such cooperative associations, if such federation possesses no greater powers or purposes than cooperative associations so defined; or (6) motor vehicles used in carrying property consisting of ordinary livestock, fish (including shell fish), or agricultural (including horticultural) commodities (not including manufactured products thereof), if such motor vehicles are not used in carrying any other property, or passengers, for compensation: *Provided*, That the words "property consisting of ordinary livestock, fish (including shell fish), or agricultural (including horticultural) commodities (not including manufactured products thereof)" as used herein shall include property shown as "Exempt" in the "Commodity List" incorporated in ruling numbered 107, March 19, 1958, Bureau of Motor Carriers, Interstate Commerce Commission, but shall not include property shown therein as "Not exempt": *Provided further, however*, That notwithstanding the preceding proviso the words "property consisting of ordinary livestock, fish (including shell fish), or agricultural (including horticultural) commodities (not including manufactured products thereof)" shall not be deemed to include frozen fruits, frozen berries, frozen vegetables, cocoa beans, coffee beans, tea, bananas, or hemp, and wool imported from any foreign country, wool tops and noils, or wool waste (carded, spun, woven, or knitted), and shall be deemed to include cooked or uncooked (including breaded) fish or sheel fish when frozen or fresh (but not including fish and shell fish which have been treated for preserving, such as canned, smoked, pickled, spiced, corned or kippered products); or (7) motor vehicles used exclusively in the distribution of newspapers; or (7a) the transportation of persons or property by motor vehicle when inci-

dental to transportation by aircraft nor, unless and to the extent that the Commission shall from time to time find that such application is necessary to carry out the national transportation policy declared in this Act, shall the provisions of this part, except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment apply to: (8) the transportation of passengers or property in interstate or foreign commerce wholly within a municipality or between contiguous municipalities or within a zone adjacent to and commercially a part of any such municipality or municipalities, except when such transportation is under a common control, management, or arrangement for a continuous carriage or shipment to or from a point without such municipality, municipalities, or zone, and provided that the motor carrier engaged in such transportation of passengers over regular or irregular route or routes in interstate commerce is also lawfully engaged in the intrastate transportation of passengers over the entire length of such interstate route or routes in accordance with the laws of each State having jurisdiction; or (9) the casual, occasional, or reciprocal transportation of passengers or property by motor vehicle in interstate or foreign commerce for compensation by any person not engaged in transportation by motor vehicle as a regular occupation or business, unless, in the case of transportation of passengers, such transportation is sold or offered for sale, or provided or procured or furnished or arranged for, by a broker, or by any other person who sells or offers for sale transportation furnished by a person lawfully engaged in the transportation of passengers by motor vehicle under a certificate or permit issued under this part or under a pending application for such a certificate or permit; or (10) the emergency transportation of any accidentally wrecked or disabled motor vehicle in interstate or foreign commerce by towing.

* * * *

GENERAL DUTIES AND POWERS OF THE COMMISSION

SEC. 204. [*August 9, 1935, amended June 29, 1938, September 18, 1940, March 27, 1942, August 3, 1956.*] [*49 U. S. C. § 304.*] (a) It shall be the duty of the Commission—

(1) To regulate common carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

(2) To regulate contract carries by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

(3) To establish for private carriers of property by motor vehicle, if need therefor is found, reasonable requirements to promote safety of operation, and to that end prescribe qualifications and maximum hours of service of employees, and standards of equipment. In the event such requirements are established, the term "motor carrier" shall be construed to include private carriers of property by motor vehicle in the administration of sections 204(c); 205; 220; 221; 222(a), (b), (d), (f), and (g); and 224.

* * * *

(4a) To determine, upon its own motion, or upon application by a motor carrier, a State board, or any other party in interest, whether the transportation in

interstate or foreign commerce performed by any motor carrier or class of motor carriers lawfully engaged in operation solely within a single State is in fact of such nature, character, or quantity as not substantially to affect or impair uniform regulation by the Commission of transportation by motor carriers engaged in interstate or foreign commerce in effectuating the national transportation policy declared in this Act. Upon so finding, the Commission shall issue a certificate of exemption to such motor carrier or class of motor carriers which, during the period such certificate shall remain effective and unrevoked, shall exempt such carrier or class of motor carriers from compliance with the provisions of this part, and shall attach to such certificate such reasonable terms and conditions as the public interest may require. At any time after the issuance of any such certificate of exemption, the Commission may by order revoke all or any part thereof, if it shall find that the transportation in interstate or foreign commerce performed by the carrier or class of carriers designated in such certificate shall be, or shall have become, or is reasonably likely to become, of such nature, character, or quantity as in fact substantially to affect or impair uniform regulation by the Commission of interstate or foreign transportation by motor carriers in effectuating the national transportation policy declared in this Act. Upon revocation of any such certificate, the Commission shall restore to the carrier or carriers affected thereby, without further preceedings, the authority, if any, to operate in interstate or foreign commerce held by such carrier or carriers at the time the certificate of exemption pertaining to such carrier or carriers became effective. No certificate of exemption shall be denied, and no order of revocation shall be issued, under this subparagraph, except after reasonable opportunity for hearing to interested parties. Where an application is made in good faith for the exemption of a motor carrier

under this subparagraph, accompanied by a certificate of a State board of the State in which the operations of such carrier are carried on stating that in the opinion of such board such carrier is entitled to a certificate of exemption under this subparagraph, such carrier shall be exempt from the provisions of this part beginning with the sixtieth day following the making of such application to the Commission unless prior to such time the Commission shall have by order denied such application, and such exemption shall be effective until such time as the Commission, after such sixtieth day, may by order deny such application or may by order revoke all or any part thereof as hereinbefore authorized. In any case where a motor carrier has become exempt from the provisions of this part as provided in this subparagraph, it shall not be considered to be a burden on interstate or foreign commerce for a State to regulate such carrier with respect to the operations covered by such exemption. Applications under this subparagraph shall be made in writing to the Commission, verified under oath, and shall be in such form and contain such information as the Commission shall by regulations require.

* * * *

APPLICATION FOR CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

SEC. 206. [*August 9, 1935, amended June 29, 1938, September 18, 1940, September 1, 1950.*] [*49 U. S. C. § 306.*] (a) (1) Except as otherwise provided in this section and in section 210a, no common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such

operations: *Provided, however*, That, subject to section 210, if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or if engaged in furnishing seasonal service only, was in bona fide operation on June 1, 1935, during the season ordinarily covered by its operation and has so operated since that time, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after this section shall take effect, and if such carrier was registered on June 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such certificate. Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in section 207 (a) of this part and such certificate shall be issued or denied accordingly. Pending the determination of any such application the continuance of such operation shall be lawful:

* * * * *

RATES, FARES, AND CHARGES OF COMMON CARRIERS BY MOTOR VEHICLE

SEC. 216. [*August 9, 1935, as amended June 29, 1938, and September 18, 1940.*] [*49 U. S. C. § 316.*]

* * * *

(b) It shall be the duty of every common carrier of property by motor vehicle to provide safe and adequate

service, equipment, and facilities for the transportation of property in interstate or foreign commerce; to establish, observe, and enforce just and reasonable rates, charges, and classifications, and just and reasonable regulations and practices relating thereto and to the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, and all other matters relating to or connected with the transportation of property in interstate or foreign commerce.

* * * *

TARIFFS OF COMMON CARRIERS BY MOTOR VEHICLE

SEC. 217. [*August 9, 1935, amended September 18, 1940.*] [*49 U. S. C. § 317.*] (a) Every common carrier by motor vehicle shall file with the Commission, and print, and keep open to public inspection, tariffs showing all the rates, fares, and charges for transportation, and all services in connection therewith, of passengers or property in interstate or foreign commerce between points on its own route and between points on its own route and points on the route of any other such carrier, or on the route of any common carrier by railroad and/or express and/or water, when a through route and joint rate shall have been established. Such rates, fares, and charges shall be stated in terms of lawful money of the United States. The tariffs required by this section shall be published, filed, and posted in such form and manner, and shall contain such information, as the Commission by regulations shall prescribe; and the Commission is authorized to reject any tariff filed with it which is not in consonance with this section and with such regulations. Any tariff so rejected by the Commission shall be void and its use shall be unlawful.

* * * *

SCHEDULES OF CONTRACT CARRIERS BY MOTOR VEHICLE

SEC. 218. [*August 9, 1935, amended June 29, 1938, September 18, 1940, August 13, 1957.*] [*49 U. S. C. § 318.*] (a) It shall be the duty of every contract carrier by motor vehicle to establish and observe reasonable minimum rates and charges for any service rendered or to be rendered in the transportation of passengers or property or in connection therewith and to establish and observe reasonable regulations and practices to be applied in connection with said reasonable minimum rates, fares, and charges. It shall be the duty of every contract carrier by motor vehicle to file with the Commission, publish, and keep open for public inspection, in the form and manner prescribed by the Commission, schedules containing the actual rates or charges of such carrier for the transportation of passengers or property in interstate or foreign commerce, and any rule, regulation, or practice affecting such rates or charges and the value of the service thereunder: *Provided*, That any contract carrier serving but one shipper having rendered continuous service to such shipper for not less than one year may file reasonable minimum rates and charges unless the Commission in any individual case, after hearing, finds it in the public interest to require the filing of actual rates and charges. No such contract carrier, unless otherwise provided by this part, shall engage in the transportation of passengers or property in interstate or foreign commerce unless the actual rates or charges for such transportation by said carrier have been published, filed, and posted in accordance with the provisions of this part. Nothing herein provided shall be so construed as to require such carriers to maintain the same rates, rules and regulations for the same services for all shippers served. No reduction shall be made in any such charge either directly or by means of any change in any rule, regulation, or prac-

tice affecting such charge or the value of the service thereunder, nor shall any new charge be established, except after thirty days' notice of the proposed change or new charge filed in the aforesaid form and manner; but the Commission may, in its discretion and for good cause shown, allow such change upon less notice, or modify the requirements of this paragraph with respect to posting and filing of such schedules, either in particular instances, or by general order applicable to special or peculiar circumstances or conditions. Such notice shall plainly state the change proposed to be made and the time when such change will take effect. No such carrier shall demand, charge, or collect compensation for such transportation different from the charges filed in accordance with this paragraph, as affected by any rule, regulation, or practice so filed, or less than the minimum rate or charge as may be prescribed by the Commission from time to time, and it shall be unlawful for any such carrier, by the furnishing of special services, facilities, or privileges, or by any other device whatsoever, to charge, accept, or receive compensation different from the actual rates and charges so filed, or less than the minimum charges so prescribed: *Provided*, That any such carrier or carriers, or any class or group thereof, may apply to the Commission for relief from the provisions of this paragraph, and the Commission may, after hearing, grant such relief to such extent and for such time, and in such manner as in its judgment is consistent with the public interest and the national transportation policy declared in this Act.

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Supreme Court of the United States

October Term, 1965

No. 511

THE PENNSYLVANIA RAILROAD COMPANY

v.

UNITED STATES OF AMERICA and
THE INTERSTATE COMMERCE COMMISSION

On Appeal From the United States District Court
for the Eastern District of Pennsylvania

JURISDICTIONAL STATEMENT

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1965

No.

THE PENNSYLVANIA RAILROAD COMPANY

v.

UNITED STATES OF AMERICA AND
THE INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JURISDICTIONAL STATEMENT

OPINION BELOW

The Opinion of the District Court has not been reported as of the time of the filing of this Statement. A copy of the Opinion is set forth as Appendix A to this Statement. The Report of the Interstate Commerce Commission is printed at 94 M.C.C. 541 and is reproduced as Appendix C to this Statement.

JURISDICTION

This action was brought under 28 U.S.C. §§ 1336, 1398, 2284, and 2321-2325 to set aside an Order of the Interstate

Commerce Commission. The judgment of the Three-Judge District Court (Appendix B *infra*), was entered on June 11, 1965, and Notices of Appeal were filed by the American Trucking Associations, Inc. and National Motor Freight Traffic Association, Inc., on July 1, 1965, and by The Pennsylvania Railroad Company on July 15, 1965.

The jurisdiction of this Court to review the judgment of the District Court on direct appeal is conferred by 28 U.S.C. §§ 1253 and 2101(b), and is sustained by *United States v. Drum*, 368 U.S. 370, 373.

STATUTES INVOLVED

The Interstate Commerce Act, Sections 1(1)(a)(b), (2)(a); 202(a)(b); 203(a)(10)(13)(17)(20), (b); 204(a)-(1)(2)(3); and 216(a)-(j), [49 U.S.C. §§ 1(1)(a)(b), (2)-(a); 302(a)(b); 303(a)(10)(13)(17)(20), (b); 304(a)(1)-(2)(3); and 316(a)-(j)]. These provisions are set forth in Appendix D.

QUESTIONS PRESENTED

1. Whether the Interstate Commerce Commission correctly interpreted the applicable provisions of the Interstate Commerce Act when it concluded that for-hire motor transportation, within the confines of a single State, of property which has moved from, or will move to, points beyond the same State in private motor carriage, the entire movement being continuous, is *not* interstate commerce subject to economic regulation under Part II of the Interstate Commerce Act?

2. Whether the District Court was correct in affirming the order and holding of the Interstate Commerce Commission?

STATEMENT

Among the Divisions of the Commission, there had been different opinions ". . . as to whether transportation by for-hire motor carriers of property within a single State of goods which moved from, or will move to, points outside the State by private motor carriage, the entire movement being continuous," is a type of interstate transportation which is subject to the Commission's economic regulatory powers. In other words, does such for-hire transportation require a certificate or permit from the Commission before it can be lawfully undertaken by a motor carrier; and once authorized are the prices for it subject to the Commission's supervision? Since the Divisions of the Commission had power to make final decisions where such questions were at issue, and had reached different conclusions, confusion was created within the transportation industry (Appendix C, at 14c).

To remedy this situation, the Commission instituted an interpretative rule-making proceeding. In this proceeding, there were no hearings; but as provided by the Administrative Procedure Act, the Commission invited interested persons to submit written statements.[1]

Thirty-seven statements were received and considered by the Commission. The opinions expressed in these statements were about equally divided on the question of whether jurisdiction existed. Among those submitting statements in support of the existence of jurisdiction were American Trucking Associations, Inc., National Motor Freight Traffic Association, Inc. and The Pennsylvania Railroad Company, all of which are appellants here.

On March 17, 1964, the Commission served its Report and Order in which it concluded—with four of its eleven Commissioners dissenting—that the involved for-hire motor carrier transportation is not subject to economic

1. Administrative Procedure Act, § 4(a)(b), 5 U.S.C. § 1003 (a)(b).

regulation, notwithstanding the fact it is in interstate commerce.

On September 28, 1964, the Railroad brought the Report and Order before the District Court for the Eastern District of Pennsylvania for review.

After receiving briefs and hearing oral argument, the Three-Judge District Court, comprised of Hon. Abraham L. Freedman, Circuit Judge, and Hon. C. William Kraft, Jr. and Hon. A. Leon Higginbotham, Jr., District Judges, on April 23, 1965, in a *per curiam* opinion, sustained the Commission's Order. The Opinion of the Court was finalized in a judgment entered June 11, 1965.

The Opinion of the District Court is premised entirely upon the reasoning of this Court in *Penna R. Co. v. P. U. Comm'n,* 298 U.S. 170, although that case was concerned with the jurisdiction of the Commission under Part I of the Interstate Commerce Act which provides for the regulation of the railroads. By contrast, the instant matter is concerned with the scope of the Commission's jurisdiction over motor carrier transportation under Part II of the Act which provides a much different pattern of regulation from that established by Part I. Furthermore, the statutory language interpreted in the *Penna. R. Co.* case is quite different from that involved here.

THE QUESTIONS ARE SUBSTANTIAL

The decision of the District Court holds that the Commission is without jurisdiction to regulate, from the economic standpoint, for-hire motor carrier operations which are, beyond all doubt, in interstate commerce even though they are confined to a single state. *Baltimore & O. S. W. R. R. Co. v. Settle,* 260 U.S. 166, 171; *Penna. R. Co. v. P. U. Comm'n, supra,* at 174. The correctness of this decision is a question of substantial importance not only because of its effect upon the regulated transportation industry but also because of its impact upon the American public generally.

Throughout this nation there are many of the involved for-hire motor carrier movements,[2] both of the common and contract carrier types, in interstate commerce which, although confined to a single state, traverse great distances and are just as important—and in many instances more important—to the stream of interstate commerce as are such motor operations across state lines. For example, a movement in interstate commerce between Philadelphia and Pittsburgh covers 291 miles and connects two of the 20 largest cities in the country. Such a movement is of much greater importance than a haul over virtually the same routes from Camden, N. J. to Johnstown, Pa., which covers 234 miles and unites two relatively small cities. Many other such examples throughout the country might be noted. In such a situation, the involved for-hire movement from Camden to Johnstown, being across state lines. is subject to Federal economic regulation; but the Philadelphia to Pittsburgh movement, although longer in distance and more important from the size of the communities served, is not. The inequality in this regulatory pattern might seem tempered by the fact that the Philadelphia to Pittsburgh movement is subject to economic regulation by the Commonwealth of Pennsylvania. This, however, it would appear, is not the case.

This Court, in *Castle v. Hayes Freight Lines,* 348 U.S. 61, in commenting upon the extent to which Congress, in regulating the interstate motor carrier industry, has occupied the field, said:

> "Congress in the Motor Carrier Act adopted a comprehensive plan for regulating the carriage of goods by motor truck in interstate commerce. The federal plan of control was so all-embracing that former power of states over interstate motor carriers was

2. When speaking of the "involved" for-hire motor carrier operation, this pleading is concerned only with those within the confines of a single state which are preceded, or followed, by a private carrier movement.

> greatly reduced. No power at all was left in states to determine what carriers could or could not operate in interstate commerce. Exclusive power of the Federal Government to make this determination is shown by § 306 of 49 U.S.C. which describes the conditions under which the Interstate Commerce Commission can issue certificates of convenience and necessity." (*Id.* at 63) [3]

Since the involved for-hire motor carriage is in interstate commerce, *Castle* casts serious doubts as to whether the states retain jurisdiction to subject it to economic regulation. If the states are without such power, there is a large void in economic regulation over a substantial portion of the for-hire motor carrier operations in interstate commerce because of the accident of their geography. Other operations, likewise in interstate commerce, within the same general geographical area and of the identical kind and nature, by contrast are subject to full and complete economic regulation by the Interstate Commerce Commission merely because they happen to cross a state line. The destructive effect that such a situation has upon the regulatory scheme of the Interstate Commerce Act must be obvious. Whether Part II of the Act should be interpreted to permit this is therefore a question of great concern to the regulated transportation industry which is among the largest industries in this nation.

But apart from the importance of this question to the regulated transportation industry, it has broader concern and implications to the American people. In addition to providing economic regulation for for-hire motor carrier operations in interstate commerce, Part II of the Interstate Commerce Act places the responsibility upon the Commission to regulate such carriage with respect to safety of operations. The power to regulate the safety of operations of for-hire motor carriers, both common and

3. See also *Daniels v. United States*, 210 F. Supp. 942, 950 (D. Mont. 1962) aff'd *per curiam* 372 U.S. 704.

contract, is contained in the very same paragraphs that authorize the Commission to impose economic regulation upon such carriers, namely, Section 204(a)(1)(2).[4]

While the Commission is without power to regulate economically private carriage, it is given the responsibility to regulate the safety of private trucking in an entirely separate paragraph of the Act, which is Section 204(a)(3).[5] But whatever the power of the Commission may be to regulate the safety of private carriage, it is of no moment here because the involved transportation is not private but, rather, is for-hire, being either common or contract carriage. Thus, under the reasoning of the District Court, if the Commission is without jurisdiction to regulate economically the involved for-hire motor carrier operations, although in interstate commerce, because they are confined to a single state and are preceded or followed by a movement in private carriage, it follows that jurisdiction is equally lacking to subject them to safety regulation.[6] This of itself raises a question of great importance for the issue is whether Congress intended this gap in the federal safety legislation. And when this question is viewed against the language of this Court in *Castle,* it takes on added importance because the indication is that the states are without jurisdiction to regulate for-hire motor carrier operations in interstate commerce. If this is so, absence of jurisdiction, both on the part of the Interstate Commerce Commission and the states to impose economic regulation upon

4. 49 U.S.C. §§ 304(a)(1)(2), App. D. at 5d.

5. 49 U.S.C. § 304(a)(3), App. D. at 6d.

6. Where particular types of for-hire motor carriage are exempted by expressed statutory provisions from economic regulation, the Commission's power to impose safety regulations with respect to them is specifically preserved in the exemption provisions. Section 203(b) of the Act, 49 U.S.C. § 303(b) [Appendix D at 3d, 4d, 5d] is an example. But the District Court does not base the non-jurisdiction with respect to the involved for-hire carriage upon any specific exemption provision. Rather, it is premised upon the extent of the Commission's powers as generally conferred. In these general provisions there is no preservation of safety jurisdiction with respect to for-hire operations in interstate commerce which are not embraced.

the involved for-hire motor carrier operations is only one result of the District Court's decision. The other result is an equal absence of jurisdiction on the part of either the Interstate Commerce Commission or the states to impose safety regulation upon this type of motor carriage. In this day, when over eight million new automobiles are being sold annually and the highway accident toll is a problem of major consequence, the importance of the question raised by this appeal, from the standpoint of the well-being of the public generally, can scarcely be gainsaid.

CONCLUSION

For the foregoing reasons, this appellant believes that probable jurisdiction should be noted.

Respectfully submitted,

CARMINE J. LIOTTA
CARL HELMETAG, JR.
1138 Transportation Center
Six Penn Center Plaza
Philadelphia, Pa. 19104
Counsel for Appellant

CERTIFICATE OF SERVICE

I, Carl Helmetag, Jr., attorney for the appellant, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 30th day of August, 1965, in compliance with Rule 33 of the Revised Rules of Practice, I served copies of the foregoing Jurisdictional Statement on the several parties by mailing copies thereof, first-class mail, postage prepaid, as follows:

1. On the appellee, United States of America, copies to Hon. Nicholas deB. Katzenbach, Attorney General of the United States; Hon. Thurgood Marshall, the Solicitor General, Department of Justice, Washington 25, D.C.; Drew J. T. O'Keefe, Esq., United States Attorney for the Eastern District of Pennsylvania, 4042 U.S. Courthouse, Philadelphia, Pa. 19107.

2. On the appellee, Interstate Commerce Commission, copies to Robert W. Ginnane, Esq., its General Counsel, and I. K. Hay, Esq., Deputy General Counsel, at the offices of the Commission, Washington, D. C. 20423.

3. On American Trucking Associations, Inc., copies to Peter T. Beardsley, Esq., Richard R. Sigmon, Esq. and Harry J. Jordan, Esq., 1616 P Street, N.W., Washington, D.C., 20036; and to Ralph C. Busser, Jr., Esq., 1710 Locust Street, Philadelphia, Pa. 19103.

4. On South Paterson Trucking Co., Inc., and Private Carrier Conference, Inc., copies to Joseph E. Keller, Esq., and William H. Borghesani, Jr., Esq., 1712 N Street, N.W., Washington, D.C. 20036.

5. On The National Industrial Traffic League, copies to John F. Donelan, Esq., and William L. Slover, Esq., 888—17th Street, N.W., Washington, D.C.

6. On National Motor Freight Traffic Association, Inc., copies to Bryce Rea, Jr., Esq., 917 Munsey Building, Washington, D. C. 20004.

7. On the Pennsylvania Public Utility Commission, copies to Joseph C. Bruno, Esq., Chief Counsel, and William A. Goichman, Esq., Assistant Counsel, North Office Building, Harrisburg, Pennsylvania.

.....

Carl Helmetag, Jr.

APPENDIX A

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION No. 36561

THE PENNSYLVANIA RAILROAD COMPANY

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION

APPEAL FROM A REPORT AND ORDER OF THE
INTERSTATE COMMERCE COMMISSION

Argued February 25, 1965

Before FREEDMAN, *Circuit Judge* and KRAFT and HIGGINBOTHAM, *District Judges*

OPINION OF THE COURT

(Filed April 23, 1965)

PER CURIAM.

We are here asked to hold that the Interstate Commerce Commission must extend its economic regulation into certain areas pertaining to ". . . for hire motor transportation within the confines of a single state"[1]—even

1. Motor Transportation of Property Within A Single State, 94 MCC 541, 542 (1964).

These proceedings were originally instituted by an Order of May 21, 1962, of the Interstate Commerce Commission noting that it desired to issue an "interpretive ruling" because there was ". . . a difference of opinion between divisions of the Commission as to

though the Commission (by a majority) [2] has held that there is no statutory jurisdiction for the economic regulation of the type requested by petitioners. Little can be added to the careful analysis of the Commission's opinion, which notes the past dichotomies and conflicts between various divisions within the Commission, and the historical and statutory basis for its present legal conclusions.

Almost three decades ago in *Pa. R. R. Co. v. Public Utilities Commission,* 298 U.S. 170, 174 (1936), 56 S. Ct. 687, 688-89, Justice Cardozo spoke with clarity when noting that:

> "The question for us here is not whether the movement . . . is to be classified as commerce or even as commerce between states. *The question is whether it is that particular form of interstate commerce which Congress has subjected to regulation* in respect of rates by a federal commission." (Emphasis added.)

The Supreme Court held that Congress had not granted to the Commission jurisdiction to regulate the rates then

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whether transportation by for-hire motor carriers of property within a state of goods which have moved or will move to or from points outside the state by private motor carriers, the entire movement being continuous, is interstate commerce subject to the Interstate Commerce Act or whether it is intrastate transportation." The Commission further noted that on January 15, 1962, the South Paterson Trucking Co., Inc., of Paterson, New Jersey, had filed a petition seeking a declaratory order making ". . . definite and certain the application of Section 206(a) of the Act when merchandise is transported into a state in proprietary (private) carriage and is ultimately delivered to points in the same state by a for-hire carrier; and that it is desirable that the matter be considered and resolved by the Commission by the issuance of an interpretive ruling; . . ."

Pursuant to the May 21, 1962 Order, thirty-seven statements were filed with the Commission noting the views of various interested rail and motor carriers, manufacturers, motor carrier associations, associations of manufacturers, state regulating commissions and other persons. After receipt of these briefs and statements, the Commission issued its opinion on March 2, 1964, MC-C3626, reported at 94 MCC 541 (1964).

2. Four of the eleven Commissioners dissented.

in issue. In *Pennsylvania R. R. Co., supra,* the Court was considering Part I of the Interstate Commerce Act (49 U.S.C. §§ 1-26) and in the instant matter we are construing Part II of the Interstate Commerce Act (49 U.S.C. §§ 301-327). Nevertheless we feel, as did the Commission below,[3] that the logic of *Pennsylvania R. R. Co., supra,* is equally applicable to Part II, and that there are no sufficiently significant statutory differences to warrant a different result. Thus we affirm the order and holding of the Commission below.

By THE COURT:

ABRAHAM L. FREEDMAN,
Abraham L. Freedman,
Circuit Judge.

C. WILLIAM KRAFT, JR.,
C. William Kraft, Jr.,
District Judge.

A. LEON HIGGINBOTHAM, JR.,
A. Leon Higginbotham, Jr.,
District Judge.

---

3. In discussing the Pennsylvania case, *supra,* the Commission said: "The Pennsylvania case made it clear that not all commerce is transportation; that transportation begins only when merchandise has been placed in the possession of a carrier subject to economic regulation; and that a shipper is not a carrier subject to economic regulation under the provisions of what is now part I of the act. The fundamental principles of the Pennsylvania case are not altered in dealing with part II instead of part I. For although part II extends to proprietary operations for the purposes of regulating safety of operations and hours of service, it does not consider shippers to be subject to the act for the purposes of economic regulation. Thus under part II, just as under part I, the transportation must be considered as beginning at the point where the shipper tenders his goods to a for-hire carrier. If delivery is then made at a point in the same State, the relevant transportation is not interstate transportation." (94 MCC at 550.)

APPENDIX B

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THE PENNSYLVANIA RAILROAD COMPANY, et al.,
Plaintiffs,
v.
UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Defendants.

CIVIL ACTION
No. 36561

FINAL JUDGMENT AND DECREE

The above-entitled action having come on for hearing on the merits on February 25, 1965, before a duly constituted district court of three judges convened pursuant to sections 2284 and 2325 of Title 28, United States Code, and the Court having considered the pleadings, the briefs, and the oral arguments of counsel, and having also considered the certified copy of the record made before the Interstate Commerce Commission in the proceeding under review, and being fully advised in the premises, and the Court having filed its opinion on April 23, 1965, in which it held valid and sustained the orders entered by the Commission on March 2, 1964, and August 5, 1964, in Docket No. MC-C-3626, *Motor Transportation of Property Within a Single State,* 94 M.C.C. 541, it is hereby

ORDERED, ADJUDGED AND DECREED that the relief prayed for in the complaint be, and it is hereby, denied and the complaint is dismissed, the plaintiffs to pay the costs.

Dated this 11th day of June, 1965.

ABRAHAM L. FREEDMAN,
Abraham L. Freedman,
United States Circuit Judge.

C. WILLIAM KRAFT, JR.,
C. William Kraft, Jr.,
United States District Judge.

A. LEON HIGGINBOTHAM, JR.,
A. Leon Higginbotham, Jr.,
United States District Judge.

APPROVED:

CARL HELMETAG, JR.,
Carl Helmetag, Jr.,
Attorney for Pennsylvania Railroad Co., Plaintiff.

RALPH C. BUSSER, JR.,
Ralph C. Busser, Jr.,
Per: N. W.
Attorney for American Trucking Associations, Inc. and National Motor Freight Traffic Association, Inc., Intervening Plaintiffs.

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I. K. HAY,
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Attorney for Interstate Commerce Commission, Defendant.

V. BAKER SMITH,
V. Baker Smith,
Attorney for Private Carrier Conference, Inc. of American Trucking Associations, Inc. and South Paterson Trucking Company, Inc., Intervening Defendants.

THOMAS F. MOUNT,
Thomas F. Mount,
Attorney for The National Industrial Traffic League, Intervening Defendants.

WILLIAM A. GOICHMAN,
William A. Goichman,
Attorney for Pennsylvania Public Utility Commission, Intervening Defendant.

APPENDIX C.

Served March 17, 1964

M-11005

INTERSTATE COMMERCE COMMISSION

No. MC-C-3626

MOTOR TRANSPORTATION OF PROPERTY WITHIN A SINGLE STATE

Decided March 2, 1964

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1. For-hire motor transportation within a single State of property, which has moved or will move in private motor carriage from or to points beyond the single State, found not to be transportation in interstate commerce subject to economic regulation under part II of the Interstate Commerce Act.

2. *Hafner and Hanson Common Carrier Application,* 69 M.C.C. 581, *Eldon Miller, Inc., Extension—Illinois,* 63 M.C.C. 313, *Dora Motor Carrier Operations Within Arizona,* 48 M.C.C. 171, *Bisceglia Contract Carrier Application,* 34 M.C.C. 233, and *Roethlisberger Transfer Co. Ext.—Frankenmuth, Mich.,* 32 M.C.C. 709, and other cases of similar import, to the extent inconsistent with the discussion herein overruled.

William M. Bennett, Mary M. Pajalich, and *Donald B. Day* for the Public Utilities Commission of the State of California.

John G. Feehan for the Maine Public Utilities Commission.

Tyre W. Burton, Chairman, *E. L. McClintock, William Barton, Frank J. Iuen,* and *Frank W. May,* Commissioners, for the Missouri Public Service Commission.

George J. Griffin for the Public Utilities Commission of the State of Connecticut.

John Block, Jr., Chairman, *G. Y. Fails,* and *Ingram B. Pickett,* Commissioners, and *L. C. Cypert* for the State Corporation Commission of New Mexico.

Kent H. Brown for the New York State Public Service Commission.

T. G. Killian for the North Carolina Utilities Commission.

William C. Seibert for the State Corporation Commission, Commonwealth of Virginia.

W. E. Aebischer, Lelland M. Cowan, J. F. Edell, Roy L. Eyster, W. R. Fleming, R. E. Gifford, Carl Helmetag, Jr., Paul H. Johansen, Al Kochka, Jr., Carll V. Kretsinger, Tom B. Kretsinger, L. M. Lewis, Hugh T. Matthews, Harry McChesney, Jr., M. L. Owens, R. Y. Schureman, John Harmon Vickers, C. E. Walker, John Scala, John M. Zachara, Peter T. Beardsley, William J. O'Brien, Jr., W. H. Borghesani, Jr., Joseph E. Keller, Harry C. Maxwell, Frederick A. Babson, Jr., John C. White, William A. Quinlan, C. A. Pascarella, Charles A. Washer, John F. Donelan, Dickson R. Loos, John M. Cleary, Austin L. Roberts, Paul V. Miller, J. M. Collins, Angus M. Holmes, Jerome Hewitt and *D. E. Burnham* for various carriers, persons, and associations filing representations.

REPORT OF THE COMMISSION

BY THE COMMISSION:

This proceeding was instituted by order of May 21, 1962, for the purpose of determining if for-hire motor transportation, within the confines of a single State, of property which has moved from, or will move to, points beyond the same State in private carriage, the entire movement being continuous, is, so far as the for-hire transportation is concerned, interstate commerce subject to the Interstate Commerce Act, including those sections thereof applicable to the economic regulation of motor carriers engaged in for-hire transportation in interstate commerce; or if the for-hire motor carriage is a movement in intrastate commerce. Underlying the institution of this proceeding is a difference of opinion that has developed between divisions of this Commission with respect to the question presented; division 1 and former division 5 concluding that the for-hire portion of the type of movement generally described above may, if the facts so warrant, be in interstate commerce within the meaning of part II of the act and subject to the operating rights provisions thereof, and division 2 concluding in proceedings before it that such for-hire transportation is not in interstate commerce within the meaning of part II and is not subject to the rate provisions of that part. In our order of May 21, 1962, we noted that a petition had been filed by South Paterson Trucking Co., Inc., seeking a declaratory order with respect to its for-hire motor carrier operations within the State of New Jersey when preceded by a movement in private carriage from a point outside New Jersey. Our order provided for participation by interested persons through the submission of written statements of their facts, views, and arguments. Thirty-seven such statements have been received, accounting for the participation of 46 interested rail and motor carriers, manufacturers, motor carrier associations and associations of manufacturers, State regula-

tory Commissions, and other persons,[1] all of whom and which shall hereinafter be called by appropriate short titles.

Factual Situation

Although not all of the statements filed describe completely the facts to which they allude, the majority of the representations dealing factually with the situation described in the instituting order herein present a basic picture of the circumstances which do or may prevail in the performance of the transportation under consideration. This transportation consists generally of small shipments consolidated into truckload quantities by a shipper for proprietary movement to a terminal or other facility of a for-hire motor carrier for sorting and distribution by the latter throughout a single State. The merchandise is some-

1. *Motor carriers:* South Paterson Trucking Co., Inc., Blue & Gray Transportation Co., Inc., Be-Mac Transport Co., Inc., Hess Cartage Company, Butler-Newark Daily Delivery, Inc., J. L. Cox & Son, Inc., Parkhill Truck Company, J. O. (Red) Willett Pipe Line Stringing Corporation, Dunn Bros., Inc., Ecklar-Moore Express, Inc., Arnold Lignon Truck Lines, Inc., McDuffee Motor Freight, Inc., Cumberland Motor Freight, Inc., Sutton Transfer, Inc., Roadway Express, Inc., Campbell's Service, National Trailer Convoy, Inc., and Dixie Ohio Express, Inc.

Motor carrier associations: Joint Northeastern Motor Carrier Association, Inc., National Motor Freight Traffc Association, Inc., American Trucking Associations, Inc., Private Truck Council of America, Inc., Private Carrier Conference, Inc., of American Trucking Associations, Inc., and the Private Truck Owners Conference of the Empire State Highway Transportation Association, Inc.

Rail carriers: The Pennsylvania Railroad Company and the Chicago, Rock Island and Pacific Railroad Company.

Manufacturers: Western Electric Company, Incorporated, Bethlehem Steel Company, Great Atlantic and Pacific Tea Company, Inc., Ford Motor Company, Montgomery Ward & Co., Incorporated, and Royal Crown Cola Co.

Manufacturer associations: American Retail Federation and the National Industrial Traffic League.

State commissions: California, Missouri, Maine, Virginia, North Carolina, New York, New Mexico, and Connecticut.

Others: Lelland M. Cowan and the National Association of Railroad and Utilities Commissioners.

times distributed without delay, and at other times is held and integrated into a carrier's distribution schedule. Bills of lading are issued to the shipper (through the driver of the proprietary motor vehicle) at the point the freight is tendered to the for-hire carrier for distribution, with the bill of lading showing the transfer point as the origin of the shipment. In all instances the for-hire carrier deals directly with the shipper and the ultimate destination of the goods shipped is known to the shipper at the time the goods begin their journey.

In addition to all-motor movements, examples are described in which freight moves across State boundaries in private transportation by water, followed by distribution within a single State by a for-hire motor carrier. We are asked to direct our conclusions herein to such operations as well as those specifically covered by the order instituting this proceeding. Inasmuch as our order of May 21, 1962, referred to all-motor operations only, we shall confine our conclusions to the situation in which motor carriage alone is involved.

Position of the Parties

The representations submitted in this proceeding are almost equally divided between those that support the view that the for-hire portion of the transportation under consideration is subject to full economic regulation under part II of the act; and those that reach the opposite view. However, two participants, Hess and the American Retail Federation, find no conflict in interpretative decisions affecting operating rights and rate matters arising under part II of the act. More particularly, all of the motor common carrier participants, except Hess, Central Motor Lines, and South Paterson Trucking; both railroad parties; Cowan; the Joint Northeastern Motor Carriers; the National Motor Freight Assn.; and the ATA favor the "interstate" view; i.e., that the for-hire one-State motor opera-

tion is subject to full economic regulation by this Commission, while South Paterson and Central Motor Lines, all of the State commissions, NARUC, the manufacturers, and, with the exception of the American Retail Federation, the manufacturer associations and private motor carrier associations take the "intrastate" position. The American Retail Federation urges that, pursuant to section 204(a)(4a) of the act, we determine that the for-hire operations involved are not of such nature as to impair the uniform regulation of transportation subject to our jurisdiction, and that we issue a general certificate of exemption therefor.

Essentially, the arguments of those who oppose economic regulation by this Commission of the involved for-hire transportation are: (1) that the applicable judicial precedents do not allow the inclusion of the private carrier portion of the interstate movement as part of the total movement to be considered in determining if the economic provisions of part II of the act apply to the for-hire portion of the movement; in other words, that for this purpose there is no "continuous" movement between a private and for-hire carrier, and that transportation, for the purpose of determining its inter- or intrastate character, exists only when merchandise is in the hands of a for-hire carrier; (2) that a contrary conclusion would be impractical and unduly burdensome on single-State for-hire carriers as they would have no way of knowing whether a shipment tendered to them by a private carrier actually originated at a point in another State; and (3) that the Congress did not intend a broad or implied construction of the act on issues involving Federal as opposed to State jurisdiction.

The arguments supporting a finding that the involved for-hire transportation is within our jurisdiction are: (1) that part II of the act is applicable to both private and for-hire carriers, and the private movement should be joined with a for-hire movement when ascertaining whether or not a shipment is in interstate commerce subject to regulation under part II; (2) that, in view of the absence

in some States of effective regulatory action over motor intrastate transportation of property, the economic regulation by us of the for-hire transportation in issue here will serve to strengthen the motor carrier industry generally; and (3) that, under accepted precedents concerned with the interstate versus intrastate nature of commerce, the for-hire portion of the involved movements are in interstate commerce, beyond the jurisdiction of the States; and should we find that such for-hire service is not within the regulatory purview of the Interstate Commerce Act, there would be created thereby, to the detriment of all concerned, a regulatory void.

HISTORICAL BACKGROUND

Generally, the type of problem before us exemplified by the decision of the Supreme Court in *Pennsylvania R. Co. v. Ohio Public Utilities Comm.*, 298 U.S. 170 (1936), hereinafter called the *Pennsylvania* case. In that case, a coal producer used its own barges and tugs to transport its own coal from a mine in Pennsylvania to another Pennsylvania point, thence over its own rail right-of-way to a plant of the producer at an Ohio point where the coal was washed, broken, assorted, and "for the first time it is ready to fill specific orders." The coal thereafter was loaded on a common carrier railroad for delivery to points in Ohio. The controversy which arose from the foregoing factual situation was whether certain interstate charges on file with us under what is now part I of the act should apply to a portion of the coal movement by common carrier railroad within Ohio. The Court, in reaching the conclusion that such transportation was not within our jurisdiction for the purpose of prescribing rates, stated, as follows (citations omitted):

> Appellants say that from the moment the coal left the mines in Pennsylvania there was a continuing intention to deliver it to consumers in another state,

whether their identity at the beginning was known or unknown, and that a movement impelled by that intention is interstate commerce which Congress has the power to regulate at any stage of the ensuing transit. * * * But there is confusion of thought in such a statement of the problem. Not all commerce is transportation, and not all transportation is by common carriers by rail. The question for us here is not whether the movement of the coal is to be classified as commerce or even as commerce between states. The question is whether it is that particular form of interstate commerce which Congress has subjected to regulation in respect of rates by a federal commission. The Interstate Commerce Act * * * is aimed at common carriers exclusively, § 1(1), (3), and not even at all these. * * * For many purposes, as for example in testing the validity of state taxation, merchandise is deemed to be in interstate commerce when it has started on its journey, though still in the possession of consignor or seller. * * * Not so, however, in determining the application of this act. Transportation begins for that purpose, if not for others, when the merchandise has been placed in the possession of a carrier. * * * And "wherever the word 'carrier' is used in this chapter it shall be held to mean 'common carrier.'" § 1(3). * * * Appellants would have us hold that this interstate transportation by an owner who does not carry for any one else will be tacked to the intrastate transportation by railroads who are in business as common carriers, and the movement thus consolidated brought within the statute. The statute and the decisions as we read them forbid this unifying process.

* * *

Neither in the cases cited by the appellants nor in any others known to us has transportation by a common carrier been combined with carriage by an owner

for the purpose of subjecting the whole to the operation of the statute when the parts would be exempt. Such a fusion, if permitted, would lead to strange results. The situation laid before us would not be changed in its essentials if a cooperative association of farmers doing business in Pennsylvania close to the state line were to use a fleet of trucks belonging to the association or its members to carry milk or vegetables from Pennsylvania to a railroad station in Ohio. Even though this were done systematically and not casually or in sporadic instances, the ensuing transportation by rail, if kept within Ohio, would not be transportation between the states within the meaning of the Act of Congress. If the concept of transportation is in need of expansion, it is for the legislative department of the government to determine how great the change shall be.

We have found it unnecessary to consider in the disposition of the case whether the treatment of the coal at * * * [the plant] would break the continuity of the movement from the mines, even if interstate transportation would otherwise exist.

Subsequent to the *Pennsylvania* decision, a series of reports involving not rate matters but operating rights found, in effect, that part II of the act differed from part I with respect to the transportation that could be viewed in establishing, for purposes of economic regulation, the interstate character of a for-hire motor movement within a single State, the movement being preceded or followed by a private movement across the State line. In *Bisceglia Contract Carrier Application,* 34 M.C.C. 233, former division 5 stated:

The provisions of part II of the act apply to "the transportation of passengers or property by motor carriers engaged in interstate or foreign commerce." Section 202(a). For the purposes of part II, the term "interstate commerce" includes—

"commerce between any place in a State and any place in another State or between places in the same State through another State, whether such commerce moves wholly by motor vehicle, or partly by motor vehicle and partly by rail, express, or *water*. [Section 203(a)(10).] [Emphasis supplied.]"

In the instant proceeding, the water carrier does not carry for anyone else, and unless the transportation performed by it may be tacked to that performed by motor vehicle, the transportation is not interstate in character within the meaning of part II of the act. Section 203(a)(10) does not expressly state that, in order to be so unified, both parts of the interstate movement must be performed by carriers operating for hire; nor, in our opinion, is that interpretation required by necessary implication * * *.

We are not unmindful of the decision of the Supreme Court in *Pennsylvania R. Co. v. Public Utilities Comm. of Ohio,* 298 U.S. 170. That decision, however, involved part I of the act. The Court expressly stated that the question there in issue was not whether the movement was interstate in character but, rather, whether it was "that particular form of interstate commerce which Congress has subjected to regulation" under part I of the act. It was pointed out that part I "is aimed at common carriers exclusively," and that, because both parts of the movement there examined were not performed by common carriers, the transportation wholly within Ohio by the rail common carriers there involved did not come within the purview of part I.

The *Bisceglia* decision was followed in *Dora Motor Carrier Operations Within Arizona,* 48 M.C.C. 171; *Eldon Miller, Inc., Extension—Illinois,* 63 M.C.C. 313; and *Hafner and Hanson Common Carrier Application,* 69 M.C.C. 581. Compare, also, *Roethlisberger Transfer Co. Ext.—Frank-*

enmuth, Mich., 32 M.C.C. 709, in which a similar result was reached without reference to the *Pennsylvania* case.

At the same time that these reports found a combination private and for-hire movement to be "interstate" and the for-hire portion subject to economic regulation, division 2, in a series of reports, adhered to the view that single-State motor transportation of the type here involved was not subject to rate regulation. In *Service Transp. Co. Contracts and Agreements*, 44 M.C.C. 419, two motor private carriers, one of which originated traffic at Philadelphia, Pa., and the other at Trenton, N.J., tendered freight to Service, a regulated for-hire carrier, at Secaucus, N.J., a point within the New York, N.Y., commercial zone, for delivery by Service at other points within the New York, N.Y., commercial zone. The question raised was whether the transportation by Service was subject to the full regulatory jurisdiction of the Commission, or partially exempt from regulation under section 203(b)(8), which exempts from economic regulation transportation which, although it is in interstate or foreign commerce, is of a distinctly local nature, "except when such transportation is under a common control, management, or arrangement for a continuous carriage or shipment * * *." In concluding that the transportation performed by Service came within the exemption of section 203(b)(8) and was not subject to economic regulation under part II, division 2, stated:

> A careful reading of the pertinent provisions of the act reveals that part II applies to the "transportation" of passengers or property by motor carriers, engaged in interstate or foreign commerce, and that the term "motor carrier" includes private carriers of property by motor vehicle in the administration of only certain specifically designated sections of part II * * *. In view of the clear restriction of our jurisdiction over private carriers to matters of safety of operation and in

the face of the longstanding interpretation of the phrase "under common control, management, or arrangement for a continuous carriage or shipment" as not embracing arrangements made by the shipper separately with two or more carriers acting independently, we are persuaded that the act does not contemplate the inclusion of a purely private carriage as part of the continuous carriage covered by that phrase.

* * *

While the situation [In the Pennsylvania case], so far as the character of the transportation was concerned, was very similar to that involved here, there are differences both in fact and in the applicable provisions of law, which might possibly be interpreted as taking this matter outside the purview of that decision of the court. Nevertheless, we are persuaded that, in the absence of a clearer evidence of a contrary Congressional intent, we should follow the doctrine of that case that a transportation by common carrier may not be "combined with carriage by an owner for the purpose of subjecting the whole to the operation of the statute when the parts would be exempt."

In *Iron and Steel Articles, Central Territory,* 53 M.C.C. 769, an investigation covering the lawfulness of certain proposed motor rates, division 2 followed the reasoning applied in the *Service* report; and, in *W. J. Holliday & Co., Inc. v. Liberty Trucking Co.,* 53 M.C.C. 22, a rate proceeding involving similar issues, it concluded that, in essence, since the term "motor carrier" does not include private carriers for purposes of rate and tariff matters, the Commission's limited jurisdiction over private carriers (for purposes of safety of operations) does not bring the for-hire service conducted wholly within a single State within the purview of the act "for the purpose of subjecting the whole to the operation of the statute when the parts would be exempt."

Thus, the decisions of divisions of this Commission arising under part II of the act may be summarized as requiring operating authority for the for-hire single-State portion of a motor movement that has originated in another State and has crossed or will cross a State line in private motor carriage, while, at the same time finding to be inapplicable an interstate motor tariff covering the single-State for-hire part of an identical movement.

Discussion and Conclusions

The representations filed by the parties indicate that our decision here is a matter of concern to significant segments of the shipping public and the motor carrier industry. It is argued, for example, that intrastate rates are generally lower than interstate rates for similar movements conducted under an interstate tariff. Or it is contended that, under the view that the involved for-hire transportation is intrastate, many shippers, who might use the services of regulated interstate motor carriers from plant site to destination, are encouraged to transport their own goods to a point just within the boundaries of the State to which their goods are destined for the purpose of avoiding interstate regulation.

In many situations involving questions of interstate versus intrastate commerce, the governing tests are clear. For example, it has long been established that for-hire motor transportation by one carrier within the confines of a single State, when preceded or followed by for-hire transportation by another carrier across a State line, may be transportation in interstate commerce subject to economic regulation under part II of the act. *Rush Common Carrier Application,* 17 M.C.C. 661. Generally, whether transportation within a single State, is, in fact, interstate is determined by the essential character of the commerce, the most important factor of which is the presence or absence of a fixed and persisting intent of the shipper that

his goods move to a destination in another State. *Baltimore & O.S.W.R. Co. v. Settle,* 260 U.S. 166.

Certain of the participants argue that we need only apply to the situation presented here the tests established in the *Settle* case in order to determine that the "essential character" of the commerce is interstate. Others argue that, since the term "interstate commerce" contained in section 202(a) is defined in section 203(a)(10) as "commerce * * * wholly by motor vehicle" between States, the for-hire transportation here involved is subject to economic regulation under part II because it is a part of "commerce" which has moved wholly by motor vehicle. Solutions such as these, however, assume that the essentially interstate character of the overall commerce will alone determine the scope of transportation regulation, and we do not think that such an assumption is proper. The *Pennsylvania* case made it clear that not all commerce is transportation; that transportation begins only when merchandise has been placed in the possession of a carrier subject to economic regulation; and that a shipper is not a carrier subject to economic regulation under the provisions of what is now part I of the act. The fundamental principles of the *Pennsylvania* case are not altered in dealing with part II instead of part I. For although part II extends to proprietary operations for the purposes of regulating safety of operations and hours of service, it does not consider shippers to be subject to the act for the purposes of economic regulation. Thus under part II, just as under part I, the transportation must be considered as beginning at the point where the shipper tenders his goods to a for-hire carrier. If delivery is then made at a point in the same State, the relevant transportation is not interstate transportation.

Although the instituting order herein states that the purpose of this proceeding is to determine if the involved for-hire transportation is in interstate commerce subject to the Interstate Commerce Act, or if it is intrastate, we

wish to emphasize that we have answered the first proposition in the negative and the second in the affirmative only in respect to economic regulation. It should be noted, however, that even though we think that the *Pennsylvania* decision does not permit the combination of for-hire transportation wholly within a single State with carriage by an owner across a State line for the purpose of subjecting the former to Federal economic regulation, there may in fact be situations where Congress has intended that the otherwise separate private interstate movement and the for-hire intrastate movement be combined in order to establish Federal jurisdiction over the whole for purposes unrelated to economic regulation. For example, compare *Walling v. Material Wholesale Food & Supply Co.*, 141 F. 2d 331, 337, 340 and *Feinman v. Philip Fleisher, Inc.*, 51 N.Y.S. 2d 31, which held to be subject to our jurisdiction under part II certain matters relative to the employment of drivers of private motor carriers operating within a single State in the transportation of traffic moving to or from such State in motor common carriage.

We agree with the results of the *Service* case, *supra*, and the decisions of division 2 cited herein. To the extent that the cited decisions of division 1 and former division 5 are inconsistent with the conclusions reached herein, they are overruled.

FINDINGS

We find (1) that for-hire motor transportation, within the confines of a single State, of property which has moved from, or will move to, points beyond the same State in private motor carriage, is, so far as the for-hire transportation is concerned, not in interstate commerce subject to economic regulation under part II of the Interstate Commerce Act and (2) that the conclusions and findings in *Hafner and Hanson Common Carrier Application*, 69 M.C.C. 581; *Eldon Miller, Inc., Extension—Illinois*, 63 M.C.C. 313; *Dora Motor Carrier Operations Within Arizona*, 48 M.C.C. 171; *Bisceglia Contract Carrier Applica-*

tion, 34 M.C.C. 233; and *Roethlisberger Transfer Co. Ext. —Frankenmuth, Mich.,* 32 M.C.C. 709, and other cases of similar import, to the extent that they are inconsistent with the discussion contained herein should be, and they are hereby, overruled.

An order will be entered discontinuing the proceeding.

COMMISSIONER FREAS, whom COMMISSIONERS HUTCHINSON, HERRING, and BUSH join, dissenting:

The decision of the Supreme Court in *Pennsylvania Railroad Co. v. Ohio Public Utilities Commission,* 298 U.S. 170 (1936), upon which the majority relies, was based upon a jurisdictional question strictly within the confines of sections 1(1)(a) and (2)(a) of part I, of the act, whereas here we are confronted with a jurisdictional question within the purview of section 202(a) and (b) of part II. In the *Pennsylvania* case, the Court expressly stated that the issue was not whether the movement was interstate in character but rather whether it was "that particular form of interstate commerce which Congress has subjected to regulation" under part I, which is "aimed at common carriers exclusively." The Court reasoned that since both parts of the movement there examined were not performed by common carriers, that performed by the rail common carrier did not come within the purview of part I. No question was presented in the *Pennsylvania* case respecting economic regulation under part II.

Part II contains no restrictive grant of jurisdiction over common carriers as does part I, but rather the jurisdiction conferred by section 202(a) of part II is over "the transportation of passengers or property by motor carriers engaged in interstate or foreign commerce." Section 203(a)(10) defines "interstate commerce" as "commerce between any place in a State and any place in another State or between places in the same State through another State, whether such commerce moves wholly by motor vehicle or partly by motor vehicle and partly by rail, express,

or water; * * *." And the term "motor vehicle" is defined by section 203(a)(13) as "any vehicle * * * propelled or drawn by mechanical power and used upon the highways in transportation of passengers or property * * *."

Although our part II jurisdiction over private carriers is limited to matters involving safety of operation and hours of service, the operations of private carriers are, nevertheless, subject to the same definition of interstate commerce as are the operations of common and contract carriers. This is obviously true since the section 203(a)(17) definition of a private carrier specifies that such carrier must be one which operates in interstate or foreign commerce; and there is only one definition of interstate commerce contained in part II, namely that in section 203(a)(10). It is plain, therefore, that the test under part II is whether the essential character of the commerce concerned is interstate. In my opinion, it is.

The Commission's decision in *Service Transp. Co. Contracts and Agreements*, 44 M.C.C. 419, also relied on strongly by the majority, is distinguishable from the situation presented herein because in that case a purely local service was involved and thus the for-hire carrier was entitled to the exemption of section 203(b)(8).

Clearly, section 216 of the act and related sections dealing with rates and tariffs apply only to common carriers. While the statute does not provide for the publication or collection of through rates or charges covering a single arrangement between carriers other than common carriers, the collection of interstate rates by a common carrier covering its portion alone of a continuous interstate movement initiated or terminated by a private motor carrier obviously is mandatory. It is my opinion that to the extent the cited decisions of division 2 imply or require a contrary result, they should be overruled.

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 2nd day of March A. D. 1964.

No. MC-C-3626

MOTOR TRANSPORTATION OF PROPERTY WITHIN A SINGLE STATE

Investigation of the matters and things involved in this proceeding having been made, and the Commission, on the date hereof, having made and filed a report herein containing its findings of fact and conclusions thereon, which report is hereby made a part hereof:

It is ordered, That this proceeding be, and it is hereby, discontinued.

By the Commission.

HAROLD D. MCCOY,
Secretary.

(SEAL)

APPENDIX D

Section 1 (49 U.S.C. § 1)

(1) That the provisions of this part shall apply to common carriers engaged in—

(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment; or

(b) The transportation of oil or other commodity, except water and except natural or artificial gas, by pipe line, or partly by pipe line and partly by railroad or by water; or

—from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States through a foreign country to any other place in the United States, or from or to any place in the United States to or from a foreign country, but only in so far as such transportation takes place within the United States.

(2) The provisions of this part shall also apply to such transportation of passengers and property, but only in so far as such transportation takes place within the United States, but shall not apply—

(a) To the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one State and not shipped to or from a foreign country from or to any place in the United States as aforesaid, except as otherwise provided in this part;

Section 202 (49 U.S.C. § 302)

(a) The provisions of this part apply to the transportation of passengers or property by motor carriers engaged in interstate or foreign commerce and to the procurement of and the provision of facilities for such transportation, and the regulation of such transportation, and of the procurement thereof, and the provision of facilities therefor, is hereby vested in the Interstate Commerce Commission.

(b) Nothing in this part shall be construed to affect the powers of taxation of the several States or to authorize a motor carrier to do an intrastate business on the highways of any State, or to interfere with the exclusive exercise by each State of the power of regulation of intrastate commerce by motor carriers on the highways thereof.

Section 203 (49 U.S.C. § 303)

(a) As used in this part—

(10) The term "interstate commerce" means commerce between any place in a State and any place in another State or between places in the same State through another State, whether such commerce moves wholly by motor vehicle or partly by motor vehicle and partly by rail, express, or water.

(13) The term "motor vehicle" means any vehicle, machine, tractor, trailer, or semitrailer propelled or drawn by mechanical power and used upon the highways in the transportation of passengers or property, or any combination thereof determined by the Commission, but does not include any vehicle, locomotive, or car operated exclusively on a rail or rails, or a trolley bus operated by electric power derived from a fixed overhead wire, furnishing local passenger transportation similar to street-railway service.

(17) The term "private carrier of property by motor vehicle" means any person not included in the terms "com-

mon carrier by motor vehicle'' or ''contract carrier by motor vehicle'', who or which transports in interstate or foreign commerce by motor vehicle property of which such person is the owner, lessee, or bailee, when such transportation is for the purpose of sale, lease, rent, or bailment, or in furtherance of any commercial enterprise.

(20) The term ''interstate operation'' means any operation in interstate commerce.

(b) Nothing in this part, except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment shall be construed to include (1) motor vehicles employed solely in transporting school children and teachers to or from school; or (2) taxicabs, or other motor vehicles performing a bona fide taxicab service, having a capacity of not more than six passengers and not operated on a regular route or between fixed termini; or (3) motor vehicles owned or operated by or on behalf of hotels and used exclusively for the transportation of hotel patrons between hotels and local railroad or other common carrier stations; or (4) motor vehicles operated, under authorization, regulation, and control of the Secretary of the Interior, principally for the purpose of transporting persons in and about the national parks and national monuments; or (4a) motor vehicles controlled and operated by any farmer when used in the transportation of his agricultural (including horticultural) commodities and products thereof, or in the transportation of supplies to his farm; or (5) motor vehicles controlled and operated by a cooperative association as defined in the Agricultural Marketing Act, approved June 15, 1929, as amended, or by a federation of such cooperative associations, if such federation possesses no greater powers or purposes than cooperative associations so defined; or (6) motor vehicles used in carrying property consisting of ordinary livestock, fish (including shell fish), or agricultural (including horticultural)

commodities (not including manufactured products thereof), if such motor vehicles are not used in carrying any other property, or passengers, for compensation: *Provided,* That the words "property consisting of ordinary livestock, fish (including shell fish), or agricultural (including horticultural) commodities (not including manufactured products thereof)" as used herein shall include property shown as "Exempt" in the "Commodity List" incorporated in ruling numbered 107, March 19, 1958, Bureau of Motor Carriers, Interstate Commerce Commission, but shall not include property shown therein as "Not exempt": *Provided further, however,* That notwithstanding the preceding proviso the words "property consisting of ordinary livestock, fish (including shell fish), or agricultural (including horticultural) commodities (not including manufactured products thereof)" shall not be deemed to include frozen fruits, frozen berries, frozen vegetables, cocoa beans, coffee beans, tea, bananas, or hemp, and wool imported from any foreign country, wool tops and noils, or wool waste (carded, spun, woven, or knitted), and shall be deemed to include cooked or uncooked (including breaded) fish or shell fish when frozen or fresh (but not including fish and shell fish which have been treated for preserving, such as canned, smoked, pickled, spiced, corned or kippered products); or (7) motor vehicles used exclusively in the distribution of newspapers; or (7a) the transportation of persons or property by motor vehicle when incidental to transportation by aircraft nor, unless and to the extent that the Commission shall from time to time find that such application is necessary to carry out the national transportation policy declared in this Act, shall the provisions of this part, except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment apply to: (8) the transportation of passengers or property in interstate or foreign commerce wholly within a municipality or between contiguous municipalities or within a zone adjacent to and

commercially a part of any such municipality or municipalities, except when such transportation is under a common control, management, or arrangement for a continuous carriage or shipment to or from a point without such municipality, municipalities, or zone, and provided that the motor carrier engaged in such transportation of passengers over regular or irregular route or routes in interstate commerce is also lawfully engaged in the intrastate transportation of passengers over the entire length of such interstate route or routes in accordance with the laws of each State having jurisdiction; or (9) the casual, occasional, or reciprocal transportation of passengers or property by motor vehicle in interstate or foreign commerce for compensation by any person not engaged in transportation by motor vehicle as a regular occupation or business, unless, in the case of transportation of passengers, such transportation is sold or offered for sale, or provided or procured or furnished or arranged for, by a broker, or by any other peson who sells or offers for sale transportation furnished by a person lawfully engaged in the transportation of passengers by motor vehicle under a certificate or permit issued under this part or under a pending application for such a certificate or permit.

Section 204 (49 U.S.C. § 304)

(a) It shall be the duty of the Commission—

(1) To regulate common carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

(2) To regulate contract carriers by motor vehicle as provided in this part, and to that end the Commission

may establish reasonable requirements with respect to unform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

(3) To establish for private carriers of property by motor vehicle, if need therefor is found, reasonable requirements to promote safety of operation, and to that end prescribe qualifications and maximum hours of service of employees, and standards of equipment. In the event such requirements are established, the term "motor carrier" shall be construed to include private carriers of property by motor vehicle in the administration of sections 204(c); 205; 220; 221; 222(a), (b), (d), (f), and (g); and 224.

Section 216 (49 U.S.C. § 316)

(a) It shall be the duty of every common carrier of passengers by motor vehicle to establish reasonable through routes with other such common carriers and to provide safe and adequate service, equipment, and facilities for the transportation of passengers in interstate or foreign commerce; to establish, observe, and enforce just and reasonable individual and joint rates, fares, and charges, and just and reasonable regulations and practices relating thereto, and to the issuance, form, and substance of tickets, the carrying of personal, sample, and excess baggage, the facilities for transportation, and all other matters relating to or connected with the transportation of passengers in interstate or foreign commerce; and in case of such joint rates, fares, and charges, to establish just, reasonable, and equitable divisions thereof as between the carriers participating therein which shall not unduly prefer or prejudice any of such participating carriers.

(b) It shall be the duty of every common carrier of property by motor vehicle to provide safe and adequate

service, equipment, and facilities for the transportation of property in interstate or foreign commerce; to establish, observe and enforce just and reasonable rates, charges, and classifications, and just and reasonable regulations and practices relating thereto and to the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, and all other matters relating to or connected with the transportation of property in interstate or foreign commerce.

(c) Common carriers of property by motor vehicle may establish reasonable through routes and joint rates, charges, and classifications with other such carriers or with common carriers by railroad and/or express and/or water; and common carriers of passengers by motor vehicle may establish reasonable through routes and joint rates, fares, or charges with common carriers by railroad and/or water. In case of such joint rates, fares, or charges it shall be the duty of the carriers parties thereto to establish just and reasonable regulations and practices in connection therewith, and just, reasonable, and equitable divisions thereof as between the carriers participating therein which shall not unduly prefer or prejudice any of such participating carriers.

(d) All charges made for any service rendered or to be rendered by any common carrier by motor vehicle engaged in interstate or foreign commerce in the transportation of passengers or property as aforesaid or in connection therewith shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof, is prohibited and declared to be unlawful. It shall be unlawful for any common carrier by motor vehicle engaged in interstate or foreign commerce to make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, gateway, locality, region, district, territory, or description of traffic, in any respect whatsoever; or to subject any particular person, port,

gateway, locality, region, district, territory, or description of traffic to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this subsection shall not be construed to apply to discriminations, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

(e) Any person, State board, organization, or body politic may make complaint in writing to the Commission that any such rate, fare, charge, classification, rule, regulation, or practice, in effect or proposed to be put into effect, is or will be in violation of this section or of section 217. Whenever, after hearing, upon complaint or in an investigation on its own initiative, the Commission shall be of the opinion that any individual or join rate, fare, or charge, demanded, charged, or collected by any common carrier or carriers by motor vehicle or by any common carrier or carriers by motor vehicle in conjunction with any common carrier or carriers by railroad and/or express, and/or water for transportation in interstate or foreign commerce, or any classification, rule, regulation, or practice whatsoever of such carrier or carriers affecting such rate, fare, or charge or the value of the service thereunder, is or will be unjust or unreasonable, or unjustly discriminatory or unduly preferential or unduly prejudicial, it shall determine and prescribe the lawful rate, fare, or charge or the maximum or minimum, or maximum and minimum rate, fare, or charge thereafter to be observed, or the lawful classification, rule, regulation, or practice thereafter to be made effective and the Commission shall, whenever deemed by it to be necessary or desirable in the public interest, after hearing, upon complaint or upon its own initiative without a complaint, establish through routes and joint rates, fares, charges, regulations, or practices, applicable to the transportation of passengers by common carriers by motor vehicle, or the maxima or minima, or maxima and minima,

to be charged, and the terms and conditions under which such through routes shall be operated: *Provided, however,* That nothing in this part shall empower the Commission to prescribe, or in any manner regulate, the rate, fare, or charge for intrastate transportation, or for any service connected therewith, for the purpose of removing discrimination against interstate commerce or for any other purpose whatever.

(f) Whenever, after hearing, upon complaint or upon its own initiative, the Commission is of opinion that the divisions of joint rates, fares, or charges, applicable to the transportation in interstate or foreign commerce of passengers or property by common carriers by motor vehicle or by such carriers in conjunction with common carriers by railroad and/or express, and/or water are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers, or any of them, or otherwise established), the Commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers, and in cases where the joint rate, fare, or charge was established pursuant to a finding or order of the Commission and the divisions thereof are found by it to have been unjust, unreasonable, or inequitable, or unduly preferential or prejudicial, the Commission may also by order determine what would have been the just, reasonable, and equitable divisions thereof to be received by the several carriers, and require adjustment to be made in accordance therewith. The order of the Commission may require the adjustment of divisions between the carriers, in accordance with the order, from the date of filing the complaint or entry of order of investigation or such other date subsequent as the Commission finds justified and, in the case of joint rates prescribed by the Commission, the order as to divisions may be made effective as a part of the original order.

(g) Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, charge, or classification for the transportation of passengers or property by a common carrier or carriers by motor vehicle, or by any such carrier or carriers in conjunction with a common carrier or carriers by railroad and/or express, and/or water in interstate or foreign commerce, or any rule, regulation, or practice affecting such rate, fare, or charge, or the value of the service thereunder, the Commission is hereby authorized and empowered upon complaint of any interested party or upon its own initiative at once and, if it so orders, without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, or charge, or such rule, regulation, or practice, and pending such hearing and the decision thereon the Commission, by filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, or charge, or such rule, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after hearing, whether completed before or after the rate, fare, charge, classification, rule, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding instituted after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, or charge, or classification, rule, regulation, or practice, shall go into effect at the end of such period: *Provided,* That this paragraph shall not apply to any initial schedule or schedules filed on or before July 31, 1938, by any such carrier in bona fide operation when this section takes effect. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or

practice, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable.

(h) In any proceeding to determine the justness or reasonableness of any rate, fare, or charge of any such carrier, there shall not be taken into consideration or allowed as evidence or elements of value of the property of such carrier, either good will, earning power, or the certificate under which such carrier is operating; and in applying for and receiving a certificate under this part any such carrier shall be deemed to have agreed to the provisions of this paragraph, on its own behalf and on behalf of all transferees of such certificate.

(i) In the exercise of its power to prescribe just and reasonable rates, fares, and charges for the transportation of passengers or property by common carriers by motor vehicle, and classifications, regulations, and practices relating thereto, the Commission shall give due consideration, among other factors, to the inherent advantages of transportation by such carriers; to the effect of rates upon the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient transportation service by such carriers at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable such carriers, under honest, economical, and efficient management, to provide such service.

(j) Nothing in this section shall be held to extinguish any remedy or right of action not inconsistent herewith.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 511

AMERICAN TRUCKING ASSOCIATIONS, INC.,
NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC.,
THE PENNSYLVANIA RAILROAD COMPANY,

Appellants,

v.

THE UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION,
SOUTH PATERSON TRUCKING COMPANY, INC., AND
PRIVATE CARRIER CONFERENCE, INC.,

Appellees.

On Appeal From the United States District Court
for the Eastern District of Pennsylvania

MOTION TO AFFIRM

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NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC.,
THE PENNSYLVANIA RAILROAD COMPANY,

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THE UNITED STATES OF AMERICA,
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Appellees.

On Appeal From the United States District Court
for the Eastern District of Pennsylvania

MOTION TO AFFIRM

In accordance with Rule 16, paragraph 1 (c) of the Revised Rules of this Court, appellees South Paterson Trucking Company, Inc. and Private Carrier Conference, Inc. move that the judgment of the district court be affirmed.

STATEMENT

In accordance with 28 U.S.C. 2284 and 2235, this is a direct appeal from a judgment of a three-judge district court which dismissed the Pennsylvania Railroad Company complaint seeking to set aside orders of the Interstate Commerce Commission in *Motor Transportation*

of Property Within a Single State, 94 M.C.C. 541 (1964). The orders sustained by the district court declared that for hire transportation by motor truck within the confines of a single state immediately followed or preceded by private motor carriage across a state line was not subject to the economic regulation of the Interstate Commerce Commission pursuant to the Interstate Commerce Act.

On September 28, 1964 the Pennsylvania Railroad Company filed a complaint with the district court seeking to overturn the report and orders of the Interstate Commerce Commission. Both the Private Carrier Conference, Inc. and the South Paterson Trucking Company, Inc., having participated as parties before the Interstate Commerce Commission, intervened as defendants to support the decision of the Interstate Commerce Commission. Motions to intervene were filed with the district court on October 15, 1964 and such motions were granted *nunc pro tunc* by the district court on June 30, 1965. The district court handed down its decision on April 23, 1965 and upheld the report and orders of the Interstate Commerce Commission (J.S.1a).[1] Formal judgment was entered on June 11, 1965 dismissing the complaint of the Pennsylvania Railroad Company and the intervening plaintiffs, American Trucking Associations, Inc. and the National Motor Freight Traffic Association.

Although an interpretation of Part II of the Interstate Commerce Act was involved, the district court used the rationale of *Pennsylvania R.R. Co. v. Public Utilities Commission*, 298 U.S. 170 (1936), 56 S.Ct. 687, as determinative of the outcome of the case before it. The key language in the district court decision is the following:

> ". . . Nevertheless we feel, as did the Commission below, that the logic of *Pennsylvania R.R. Co., supra*, is equally applicable to Part

[1] For convenience we refer to Jurisdictional Statement filed by The Pennsylvania Railroad Company.

II, and that there are no sufficiently significant statutory differences to warrant a different result. Thus we affirm the order and holding of the Commission below." (J.S. 3a)

ARGUMENT

This case presents no substantial question warranting plenary consideration by this Court:

1. At the present time under Part I of Interstate Commerce Act, for hire rail transportation within a single state immediately preceded or immediately followed by private carriage across a state line is not subject to the economic jurisdiction of the Interstate Commerce Commission. *Pennsylvania R.R. Co. v. Public Utilities Commission, supra.* The district court has held, in support of the Interstate Commerce Commission, that for hire motor truck transportation within a single state immediately preceded or followed by private motor carriage across a state line is also not subject to the economic regulation of the Interstate Commerce Commission under Part II of the Interstate Commerce Act. Appellants argue that Part I and Part II are significantly different and, accordingly, that for hire motor truck transportation within a single state immediately preceded or followed by private motor carriage across a state line is subject to the economic jurisdiction of the Interstate Commerce Commission.[2]

The effectuation of the National Transportation Policy demands that intrastate rates be applied in this situation. Congress has charged the Interstate Commerce Commis-

[2] In essence, therefore, this latter view is to the net effect that private motor carriers who wish to utilize for hire rail facilities within a state should pay intrastate rates and that private motor carriers who wish to utilize for hire motor truck facilities within a state should pay interstate rates when in both cases such transportation immediately precedes or is followed by private motor carriage across a state line.

sion with the duty to provide for and to preserve a national transportation system adequate to meet the needs of the commerce of the United States:

> "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economic, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services without unjust discriminations, undue preferences, or advantages, or unfair or destructive competitive practices; . . . All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy." 49 U.S.C. preceding Sections 1, 301, 901, and 1001.

It is quite clear, then, that the Congress intended that the Interstate Commerce Act be considered as a whole and that its individual parts not be considered in a vacuum. And yet this is just what the appellants are asking this Court to do, namely, consider Part II as not an integrated part of the overall Interstate Commerce Act.[3] The appellants would have this Court declare interstate rates applicable to single state for hire motor transportation on the one hand and on the other hand intrastate rates applicable to single state for hire rail transportation, when either is immediately preceded or immediately followed by interstate private motor carriage. This position is completely contrary to the expressed intention of the Congress as reflected in the statement of National Transportation Policy.

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[3] Generally speaking, intrastate rates are lower as far as motor truck for hire facilities are concerned than are interstate rates of motor truck for hire carriers. The economic basis for the dispute is, therefore, quite clear.

2. The underlying principles of the 1936 *Pennsylvania Railway* case, *supra*, are applicable to Part II. Not all interstate commerce is transportation and transportation begins when freight is placed in the care of a for hire carrier for movement. Thus spoke this Court in the *Pennsylvania* case. Although this latter case arose under an interpretation of the applicability of Part I of the Act, this Court in making such a pronouncement looked in part to a case which was decided by it prior to the enactment of the Interstate Commerce Act on February 4, 1887, and to pre-1936 cases, such cases having no connection, with one exception, to an interpretation of Part I of the Act.[4] In the *Pennsylvania* case, this Court simply found no inconsistency between earlier cases and the commerce versus transportation propositions announced therein and the provisions of Part I. Accordingly, this Court continued the life of these legal propositions. The district court applied the same reasoning, and found nothing in Part II inconsistent with the propositions.

This Court declared in the *Pennsylvania* case that private motor carriage across a state line followed by for hire rail carriage would be completely consistent with these propositions. This was done at a time when this Court must be presumed to have known that the Interstate Commerce Commission, pursuant to Part II of the Act, had authority to regulate the safety aspects of such carriage by private trucks across a state line. This case was argued and decided in April, 1936, whereas the power of the Interstate Commerce Commission over the safety aspects of interstate private carriage went into effect on October 1, 1935. There is no indication that with such knowledge this Court intended when freight was trans-

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[4] *Hughes Bros. Timber Co. v. Minnesota*, 272 U.S. 469, 475 (1926); *Coe v. Errol*, 116 U.S. 517, 528 (1886); *Diamond Match Co. v. Ontonagon*, 188 U.S. 82, 95 (1903); in *Southern Pacific Terminal v. Interstate Commerce Commission*, 219 U.S. 498, 527 (1911), the same proposition was sustained although this case did involve the Interstate Commerce Act. Under Part II, only "transportation" is economically regulable by the Commission and then only if it is interstate, and not otherwise exempt.

ferred to for hire rail carriers to make any such distinction concerning the applicability of intrastate rates by virtue of the fact that private trucks were so regulated. As a matter of fact, the contrary is the case.[5]

Now it is stated that since private motor carriage across a state line is regulated by the Interstate Commerce Commission for safety purposes, transportation begins when the private carrier commences a movement and if thereafter such freight is given to the custody of a single state for hire motor carrier, interstate rates are applicable. This, of course, is at variance with the *Pennsylvania* case and its underlying propositions. We submit that the substitution of motor for hire within a given state in lieu of rail for hire carriage is not a distinguishing point of decisional significance. So also concluded the district court.

3. Appellants claim there will be a regulatory vacuum unless the decision of the district court is reversed. Such is not the case. If it were, the Interstate Commerce Commission would have found it necessary to secure enabling legislation in this area. The state regulatory bodies have for decades regulated the rates of for hire car-

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[5] In the *Pennsylvania* case, this Court pointed out that the situation before it would not be changed in its essentials if a cooperative association of farmers doing business in Pennsylvania close to the state line were to use a fleet of trucks belonging to the association or its members to carry milk or vegetables from Pennsylvania to a railroad station in Ohio. This Court went on to stress on pages 176 and 177 that even though this were done systematically and not casually or in sporatic instances, the ensuing for hire transportation by rail, if kept within Ohio, would not be transportation between the states within the meaning of the Act of Congress. In using this example, the Supreme Court was referring to private carriage by motor vehicles. Lest there be any doubt of this, the language immediately preceding the recital of this example (which is consistent with the context of the whole case being related to private carriage by barges, railroad, etc.) specified "carriage by owners."

riers operating within their borders even though they were transporting goods which have or would immediately cross a state line by private carriage. This has been done just as the state regulatory agencies have regulated the rates of the railroads who operate within the borders of a single state and which carry goods received from or deliverable to a private carrier crossing a state line.

CONCLUSION

Since this Court has already considered this issue relative to Part I of the Interstate Commerce Act and the district court, finding no significant statutory differences between Parts I and II of the Act, applied the logic enunciated by this Court, no substantial question remains.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I. William H. Borghesani, Jr., attorney for the appellees, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 29th day of September, 1965, in compliance with Rule 33 of the Revised Rules of Practice, I served copies of the foregoing Motion to Affirm on the several parties by mailing copies thereof, first-class mail, postage prepaid, as follows

1. On the appellee, United States of America, copies to Hon. Nicholas DeB. Katzenback, Attorney General of the United States; Hon. Thurgood Marshall, the Solicitor General, Department of Justice, Washington 25, D. C.; Drew J.T. O'Keefe, Esq., United States Attorney for the Eastern District of Pennsylvania, 4042 U.S. Courthouse, Philadelphia, Pa. 19107.

2. On the appellee, Interstate Commerce Commission, copies to Robert W. Ginnane, Esq., its General Counsel, and I.K. Hay, Esq., Deputy General Counsel, at the offices of the Commission, Washington, D.C. 20423.

3. On the appellant, American Trucking Associations, Inc., copies to Peter Beardsley, Esq., Richard R. Sigmon, Esq. and Harry J. Jordan, Esq., 1616 P Street, N. W., Washington, D.C. 20036; and to Ralph C. Busser, Jr., Esq., 1710 Locust Street, Philadelphia, Pa. 19103.

4. On the appellant Penn. Railroad Co., copies to Carl Helmetag, Esq., Asst. General Counsel and Carmine J. Liotta, Esq., 1138 Transportation Center, Six Penn Center Plaza, Philadelphia, Pennsylvania.

5. On the National Industrial Traffic League, copies to John F. Donelan, Esq., and William L. Slover, Esq., 888 17th Street, N. W., Washington, D. C.

6. On the appellant National Motor Freight Traffic Association, Inc., copies to Bryce Rea, Jr., Esq., 917 Munsey Building, Washington, D.C. 20004.

7. On the Pennsylvania Public Utility Commission, copies to Joseph C. Brune, Esq., Chief Counsel, and William A. Goichman, Esq., Assistant Counsel, North Office Building, Harrisburg, Pennsylvania.

William H. Borghesani, Jr.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 510

AMERICAN TRUCKING ASSOCIATIONS, INC., AND NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC.,

Appellants,

v.

UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION, ET AL,

Appellees

No. 511

THE PENNSYLVANIA RAILROAD COMPANY,

Appellant,

v.

UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION, ET AL,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MOTION TO AFFIRM

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IN THE

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MOTION TO AFFIRM

Appellee, The National Industrial Traffic League, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the final judgment and decree of the District Court be affirmed on the ground that the question is so unsubstantial as not to warrant further argument.

STATEMENT

This is a direct appeal from the final judgment and decree entered on June 11, 1965, by a district court of three judges specially constituted pursuant to 28 U.S.C. §§ 2284 and 2325, dismissing an action brought by appellants to set aside a report and order of the Interstate Commerce Commission, decided on March 2, 1964, in Docket No. MC-C-3626, *Motor Transportation of Property Within a Single State* (94 M.C.C. 541).

In its order dated May 21, 1962, the Interstate Commerce Commission instituted an interpretative rule-making proceeding for the purpose of determining whether for-hire motor transportation within the confines of a single state of property which has moved from, or will move to, points beyond the same state in private carriage, is interstate commerce subject to economic regulation under Part II of the Interstate Commerce Act.

The Commission's order instituting the proceedings provided for participation by interested parties through the submission of written statements of facts, views and arguments. Statements were received from several parties classified by the Commission as either Motor Carriers, Motor Carrier Associations, Rail Carriers, Manufacturers, Manufacturer Associations, State Commissions and Others. *Motor Transportation of Property Within A Single State,* 94 M.C.C. 541, 542.

The National Industrial Traffic League, the largest shipper organization in the country, whose members are industrial shippers, boards of trade, chambers of commerce, and associations of shippers, submitted a state-

ment asserting that the Commission lacked economic jurisdiction over the involved movements.

In its report, *Motor Transportation of Property Within a Single State, supra,* decided March 2, 1964, the Commission found that the for-hire portions of the involved movements were not subject to the Commission's economic regulation (No. 510, Jurisdictional Statement, p. 46).

Appellants brought this action in the United States District Court for the Eastern District of Pennsylvania, seeking to have the report and order of March 2, 1964 set aside on the ground that the Commission had incorrectly interpreted Part II of the Interstate Commerce Act.

The National Industrial Traffic League, having actively participated as a party before the Interstate Commerce Commission, moved to intervene as a defendant to support the decision of the Interstate Commerce Commission. Such motion was granted on December 10, 1964.

The district court held that the report and order of the Commission were in accordance with the applicable law and it dismissed the complaints. (No. 510, Jurisdictional Statement, p. 29)

ARGUMENT

The decision of the district court is clearly correct.

The issue here before the court has been decisively settled in *Pennsylvania R.R. Co. v. Public Utilities Commission,* 298 U.S. 170 (1936). Although the *Pennsylvania* case arose under Part I and not Part II of the Interstate Commerce Act, the logic and thrust of that decision are equally applicable to the instant case.

In that case, Mr. Justice Cardozo indicated, *inter alia,* that "transportation," as delineated by the specific statutory language, begins when the goods are put in the pos-

session of a "carrier," defined to be a common carrier. *Idem*, at 175-6.

The controlling language of the statute resolved the issue in that case, as it should in the case at bar. In the words of Mr. Justice Cardozo:

> "With the aid of these definitions the problem before us takes on a new simplicity." *Idem*, at 175.

The Court further indicated that conveyance by a common carrier could *not* be combined with carriage by an owner "for the purpose of subjecting the whole to the operation of the statute when the parts would be exempt." *Idem*, at 177.

Lastly and most significantly, Mr. Justice Cardozo noted:

> "If the concept of transportation is in need of expansion, it is for the legislative department of the government to determine how great the change shall be." *Idem*, at 177.

It is respectfully submitted that the purported distinctions alleged by the appellants between the *Pennsylvania* case and the case at bar are neither relevant nor material.

The necessary consequence of appellants' position is that there would be a fundamentally different rule as to economic regulation under Part I than under Part II of the Interstate Commerce Act. This would be determined solely by whether the "for hire" carrier is a railroad or a motor carrier. Such a result runs directly contrary to the National Transportation Policy which provides for:

> ". . . fair and impartial regulation of all modes of transportation subject to this Act, so administered as to recognize and preserve the inherent advantages of each; . . ." [49 U.S.C. preceding Sections 1, 301, 901, and 1001]

Congress, in the same expression of policy, further added:

". . . All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy." [*ibid*]

A reasonable and plain reading of the statutory language of Part II of the Interstate Commerce Act clearly rejects any construction which might authorize Commission economic regulation, as distinct from safety regulation, where a for-hire motor carrier transports property solely within the confines of a single state. The statutory definitions contained in Sections 202(a), 203(a)(16), 203(a)(17), and 203(a)(19) [49 U.S.C. 302(a), 303(a)(16), 303(a)(17), and 303(a)(19)] clearly spell out Congressional intent to specifically delimit and restrict those modes of transport which are to be subjected to economic regulation by the I.C.C. The Commission is authorized to regulate "*transportation*" in interstate commerce by "*motor carrier*." The term "motor carrier" does not encompass "private carrier," except with respect to safety regulation as defined in Section 204(a)(3) [49 U.S.C. 304(a)(3)]. By unequivocal legislative definition a "private carrier" does not provide transportation subject to economic regulation since it is not a motor carrier within the clear statutory meaning.

The plain and unambiguous statutory language excludes from Commission economic regulation for-hire carriage by common or contract carriers whose operations are restricted to intrastate activity. Indeed, such operations are not "transportation" in interstate commerce. The statute clearly excludes Commission economic regulation of private carriers regardless of the nature of their operations.

A basic and time-honored rule of judicial interpretation requires that plain and unequivocal statutory language be read so as to attribute to this language the reasonable meaning clearly intended by the legislative draftsmen. *United States v. Public Utilities Commission*, 345 U.S. 295, 315 (1953); *Packard Motor Car Co. v. National Labor Relations Board*, 330 U.S. 485, 492-493 (1947); *United*

States v. American Trucking Associations, 310 U.S. 534, 543 (1940); *Taft v. Commissioner*, 304 U.S. 351, 359 (1938); *Helvering v. City Bank Farmers Trust Co.*, 296 U.S. 85, 89 (1935); see also *82 Corpus Juris Secundum*, Section 322(2).

Examination of the legislative history of the Motor Carrier Act reveals that Congress intended to eliminate private carriers from that class of carriers whose interstate operations were to be subject to economic regulation by the Commission. *Congressional Record*, Vol. 79, p. 5651.

It should finally be noted that to change the present and proper interpretation of Part II of the Interstate Commerce Act to prescribe economic regulation by the Interstate Commerce Commission of intrastate for-hire carriers would be enormously disruptive of present transportation practices and would impose overwhelming practical and economic burdens upon shippers and carriers alike.

If such change in the regulatory framework were for any reason warranted, this should properly be left to future Congressional action, with an appropriate opportunity for all interested parties, including members of the vast shipping public, to express their viewpoints before the national legislature.

CONCLUSION

We respectfully submit, therefore, that the appellants present no substantial question for the decision of this Court, and that the judgment and decree of the court below are plainly correct and that said judgment and decree should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John F. Donelan, attorney for appellee, The National Industrial Traffic League, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 29th day of October, 1965, in compliance with Rule 33 of the Revised Rules of Practice, I served copies of the foregoing Motion to Affirm on the several parties by mailing copies thereof, first-class mail, postage prepaid, as follows:

1. On the appellee, United States of America, copies to Hon. Nicholas DeB. Katzenbach, Attorney General of the United States; Hon. Thurgood Marshall, the Solicitor General, Department of Justice, Washington 25, D. C.; Drew J.T. O'Keefe, Esq., United States Attorney for the Eastern District of Pennsylvania, 4042 U.S. Courthouse, Philadelphia, Pa. 19107.

2. On the appellee, Interstate Commerce Commission, copies to Robert W. Ginnane, Esq., its General Counsel, and I.K. Hay, Esq., Deputy General Counsel, at the offices of the Commission, Washington, D.C. 20423.

3. On the appellant, American Trucking Associations, Inc., copies to Peter Beardsley, Esq., Richard R. Sigmon, Esq. and Harry J. Jordan, Esq., 1616 P Street, N. W., Washington, D.C. 20036; and to Ralph C. Busser, Jr., Esq., 1710 Locust Street, Philadelphia, Pa. 19103.

4. On the appellant Pennsylvania Railroad Co., copies to Carl Helmetag, Esq., Asst. General Counsel and Carmine J. Liotta, Esq., 1138 Transportation Center, Six Penn Center Plaza, Philadelphia, Pennsylvania.

5. On South Paterson Trucking Company, Inc. and Private Carrier Conference, Inc., copies to Joseph E. Keller, Esq. and W. H. Borghesani, Jr., Esq., 1712 N Street, N.W., Washington, D.C. 20036.

6. On the appellant National Motor Freight Traffic Association, Inc., copies to Bryce Rea, Jr., Esq., 917 Munsey Building, Washington, D.C. 20004.

7. On the Pennsylvania Public Utility Commission, copies to Joseph C. Brune, Esq., Chief Counsel, and William A. Goichman, Esq., Assistant Counsel, North Office Building, Harrisburg, Pennsylvania.

John F. Donelan

Office-Supreme Court, U.S.
FILED
OCT 2 9 1965
JOHN F. DAVIS, CLERK

IN THE
Supreme Court of the United States

October Term, 1965
No. 511

AMERICAN TRUCKING ASSOCIATIONS, INC., NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC., THE PENNSYLVANIA RAILROAD COMPANY,
Appellants,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, SOUTH PATERSON TRUCKING COMPANY, INC., and PRIVATE CARRIER CONFERENCE, INC., and THE PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Appellees.

On Appeal from the United States District Court for the Eastern District of Pennsylvania.

MOTION TO AFFIRM OF THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1965
No. 511

AMERICAN TRUCKING ASSOCIATIONS, INC.
NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC.
THE PENNSYLVANIA RAILROAD COMPANY,
Appellants

v.

THE UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION,
SOUTH PATERSON TRUCKING COMPANY, INC.,
and
PRIVATE CARRIER CONFERENCE, INC., and
THE PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Appellees

On Appeal From the United States District Court for the Eastern District of Pennsylvania

MOTION TO AFFIRM

In accordance with Rule 16, paragraph 1 (c) of the Revised Rules of this Court, intervening appellee, The Pennsylvania Public Utility Commission, moves that the judgment of the district court be affirmed.

STATEMENT

In accordance with 28 U.S.C. 2284 and 2235, appellants have taken a direct appeal from a judgment of the three-judge District Court for the Eastern District of Pennsylvania, which dismissed the complaint to set aside the order of the Interstate Commerce Commission.

The Interstate Commerce Commission ("I.C.C.") by an order dated May 21, 1962, instituted a rule-making proceeding to determine whether it had jurisdiction over intrastate movements by motor carriers where private carriage either preceded or succeeded the movement to and from another state.

The I.C.C. on March 2, 1964, by a vote of 7-4, held that it had no jurisdiction over motor carriers performing the within-state transportation on the ground that the private carriage could not be tacked to it.

On September 28, 1964, the Pennsylvania Railroad Company filed a complaint in the United States District Court for the Eastern District of Pennsylvania, seeking to set aside the final order of the Commission. The Pennsylvania Public Utility Commission petitioned, and was granted leave to intervene in these proceedings as a party defendant. On April 23, 1965, the District Court issued its decision dismissing the complaint. On June 11, 1965, it entered a final judgment and decree.

ARGUMENT

This case presents no substantial question warranting plenary consideration by this Court:

I. THE MOTOR CARRIER ACT OF 1935 DID NOT UNDERTAKE TO SUBJECT TO I.C.C. JURISDICTION MOTOR CARRIER TRANSPORTATION WHOLLY WITHIN ONE STATE ALTHOUGH PRIVATE CARRIAGE BY THE OWNER TOOK THE GOODS FROM OR TO ANOTHER STATE

The Pennsylvania Public Utility Commission ("P. U.C."), which is charged by the Legislature of the Commonwealth of Pennsylvania with the duty of regulating intrastate transportation by common carriers of property by motor vehicle, has intervened in this proceeding on the side of Interstate Commerce Commission. Our Commission regulates transportation by a motor carrier wholly within our State although the owner or shipper brought it from, or is taking it to, another state. *Rule Issued Against M. F. Rockey Transportation Co.*, 41 Pa. P.U.C. 263, 270 (1963). In that case our Commission said:

> "Delivery to the ultimate consignee or owner is the termination of the journey, even though the consignee or owner may continue to carry the goods in interstate commerce. See Pennsylvania R. R. Co. v. P.U.C. of Ohio, 298 U.S. 170."

The P.U.C. has a strong interest in the outcome of this proceeding, since an adverse decision would materially affect its jurisdiction over intrastate motor carriers.

(a) Appellants' Argument Impractical

In this day and age, when commerce between the states is in a state of perpetual motion, we have people living in one state, working in another; shippers and customers who are neighbors, but located in different states, etc. Up until now the rule of *Pennsylvania R. Co. v. P.U.C. of Ohio*, 298 U. S. 170 (1936), has made for convenient administration. If a person from New Jersey takes a non-exempt taxi or bus in Philadelphia to another point in Pennsylvania, this movement between two points in Pennsylvania has been always regarded as subject to the jurisdiction of the P.U.C. The carrier does not ask the customer where he came from nor need he be concerned. The customer boarded the bus in Philadelphia and since the carrier has rights from the P.U.C. from Philadelphia to Ardmore, it can transport that customer to Ardmore. Under the appellant's argument, that bus can no longer transport the customer to Ardmore since that customer started out from New Jersey. How would the bus driver know where he started out from? There is no joint freight bill or delivery receipt.

Many persons in one state may drive to another and board motor vehicles in the other state in non-exempt transportation and, according to the plaintiff, the carrier could not transport that passenger unless it had I.C.C. rights, although it had no way of knowing where the passenger originally came from.

The same illustration given for passengers is true of property. A customer bringing goods from N.J. to the ABC Truck Terminal in Philadelphia for delivery to another point in Pennsylvania presents a similar situation.

The carrier has no way of knowing where that customer originally took the goods from. Moreover, even if the carrier found out that the goods were originally brought from New Jersey, the carrier would then have to decide whether another principle of constitutional law comes into play:

> "The instances are many where a local shipment follows quickly upon an interstate shipment and yet is not to be deemed part of it, even though some further shipment was contemplated when the original movement began."
>
> *B. & O. S.W.R.R. Co. v. Settle*, 260 U. S. 166, p. 173.

Is the carrier to be charged with the making of constitutional decisions? These and other instances could be cited to show the practical impossibility of applying the rule being contended for by the appellant.

(b) Interchange in a Different Category

An interchange between two common carriers is in a different category entirely. They have bills of lading, freight bills, etc. to establish plainly beforehand the continuous interstate movement of the cargo.

(c) Pennsylvania Railroad Company v. P.U.C., 298 U.S. 170, is Controlling

The I.C.C. recognized the *Pennsylvania* case as controlling. That case, in short, held that private carriage by the owner cannot be tacked to common carrier movement by railroad to make the common carriage by railroad subject to I.C.C. regulation. The Supreme Court in that case held that the "interstate transportation" did not begin until the goods were committed to a common carrier. The Court was not interpreting the definition of interstate commerce, because "not all commerce is transportation." The inquiry in the *Pennsylvania* case was "not whether the movement of the coal is to be classified as commerce . . . between the states." The question before the court concerned the regulation of "transportation" in interstate commerce. The Supreme Court had to determine when the "transportation" which Congress made subject to the I.C.C. began. Did it begin in Pennsylvania or in Ohio?

Section 1, 49 U.S.C., §1, provides:

"(1) That the provisions of this part shall apply to common carriers engaged in—

(a) The *transportation* of passengers or property etc."

The important concept for I.C.C. regulation is "transportation," and not "commerce." Appellants miss this very essential concept in the *Pennsylvania* decision and are diverted into conceiving that the primary test is whether the motor carriers are engaged in interstate commerce.* The question is not one of commerce, but of transportation! The commerce tail cannot wag the transportation dog.

The same concept is carried over into Part II of the Interstate Commerce Act, with which we are here concerned.

Section 202, 49 U.S.C. §302, provides:

> "(a) The provisions of this part apply to the *transportation* of passengers or property by motor carriers engaged in interstate or foreign commerce . . ."

The "transportation" which Congress had in mind in Part I is the transportation which begins when the goods are placed in the hands of a common carrier. "Transportation begins for that purpose [application of Interstate Commerce Act], if not for others, when the merchandise has been placed in the possession of a carrier, (cases

---

* In the Jurisdictional Statement of American Trucking Associations, Inc., and National Motor Freight Traffic Association, Inc., (page 6) appellants say:

> "It is clear from the foregoing that a private carrier transporting his freight by motor vehicle from a place in one state to a place in another is engaged in interstate commerce as defined in Section 203(a)(10), and that he is subject to the regulatory authority of the Commission."

cited)" meaning "common carrier." *Penna. R. Co. v. P.U.C.*, 298 U.S. at p. 175.

Appellant's first and basic error is to ignore the basis upon which the Supreme Court placed its interpretation in the *Pennsylvania* case. Plaintiff, in effect, assumes that Congress had intended by the term "transportation" in Part I to include private carriage as well as common carriage, but by virtue of a limitation in para. (2)(a) eliminated rail transportation wholly within one state. Appellants then reason that since the Motor Carrier Act does not have this same limitation, the I.C.C. must have jurisdiction. Without conceding that the Motor Carrier Act does not have the same limitation, which we think it does, it is obvious to us that the appellant has misinterpreted the Supreme Court's decision in the *Pennsylvania* case.

The Supreme Court's decision was not based upon the limitation cited, although that is tangentially mentioned, but upon its interpretation of the word "transportation." This should be obvious to appellant in the statement made by the Court clarifying this as follows: "If the *concept of transportation* is in need of expansion, it is for the legislative department of the government to determine how great the change shall be."

The Court states at the outset of its discussion that it is not concerned with interpreting the concept of commerce since the Act only applies to "transportation," and not all commerce is transportation. The greater includes the latter or the lesser, but the latter does not include the former. And the transportation with which the Act is concerned is transportation by common carriers.

Section 1 says that "the provisions" apply to "the transportation of passengers or property by railroad," etc. The Supreme Court, borrowing from the definitions in Section 1 (3), 49 U.S.C. §1 (3), stated that the term "carrier" when used, means "common carrier" only. *The transportation to be regulated by the I.C.C. is transportation by common carrier.*

The definitions contained in Part II are just as clear. Sec. 202, 49 U.S.C. §302, states: "(a) The provisions of this part apply to the *transportation* of passengers or property by *motor carriers* engaged in interstate or foreign commerce, etc."

Under the Definitions in Sec. 203 (16), 49 U.S.C. §303 (16), "The term 'motor carrier' includes both a common carrier by motor vehicle and a contract carrier by motor vehicle."

Therefore, the *transportation* which Congress sought to regulate in Part II was confined to the transportation of common carriers or contract carriers.

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(1) Private Carriers Distinguished

In another section of the Act, Congress sought to subject private carriers to the safety regulations. (Sec. 204 (a) (3), 49 U.S.C. §304(a) (3)), but it never sought to subject private carriers to the regulation of transportation. The provisions of Part II were to apply only to the *transportation* by motor carriers which, by the definition, was limited to common or contract carriers.

Therefore, the Supreme Court's interpretation under Part I of the word "transportation" should be the same

under Part II, since the same wording is used. This, then, was the crux of the Supreme Court decision in the *Pennsylvania* case.

So far as the role of the limitation is concerned, this is clearly seen to be a secondary one.

When the Supreme Court referred to the limitation in Sec. 1(2) (a, b), 49 U.S.C. § 1(2) (a, b) it said: *Moreover.* "There are limitations, moreover," etc. The word "moreover" was definitely intended to be a secondary process of reasoning, and not the main one as appellant seems to think.

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(2) Coe v. Errol

In support of its conclusion that the "transportation" concept with which Congress was concerned in the Interstate Commerce Act, was common carrier transportation, the Court cites *Coe v. Errol, inter alia. Coe v. Errol* is the leading case of the cases cited. That case, although concerned with a problem in taxation, contains language which the Court no doubt had in mind in citing that case.

The Court in *Coe vs. Errol* said, in part:

> "When the products of the farm or the forest are collected and *brought* in from the surrounding country to a town or station serving as an entrepot for that particular region, whether on a river or a line of railroad, such products are not yet exports, nor are they in process of exportation, *nor is exportation begun until they are committed to the common carrier for transportation out of the state to the state of their destination*, or have started on their ultimate passage to that State."

The Supreme Court in the *Pennsylvania* case interpolates the *Coe v. Errol* decision into the *Pennsylvania* case. The Court in *Coe v. Errol* also said, in further explanation:

> "Though intended for exportation, they may never be exported; the owner has a perfect right to change his mind; and until actually put in motion, for some place out of the state, or *committed to the custody of a carrier for transportation to such place,* why may they not be regarded as still remaining a part of the general mass of property in the State?"

(d) There is the Same Limitation in Part II

To crystallize our argument, we say that the Supreme Court in the *Pennsylvania* case merely interpreted the word "transportation" as applying to transportation by common carrier and this is why private carriage cannot be tacked onto common carriage to make the within-state common carriage subject to I.C.C. regulation. The same process of reasoning would apply in Part II since the provisions of Part II are only to apply to "transportation by motor carrier", which we have seen is defined to mean transportation by common carrier or contract carrier. That is the extent to which Congress exerted its power over *transportation.*

Appellants do not see this argument, but rather argue that the limitation in Part I led to the decision in the *Pennsylvania* case. We cannot agree with this. But, even assuming, arguendo, that appellant is correct in this regard, it would seem to us that the same limitation also exists in Part II, which would, under appellants' process

of reasoning, make the *Pennsylvania* decision applicable to Part II.

There is a similar limitation provision in Part II and Part III (Water Carriers). Part I was enacted in 1887, Part II in 1935, and Part III in 1940. In each Part there is a similar limitation to satisfy the states-rights element. Naturally, when Part II was drafted, some 48 years later, the framers wanted to protect the state rights even more, as to taxation, license fees on highway, etc., and so the limitation provision would not have been expected to be written in the same language of 1887 when taxation and state highway charges were not so important.

These three sections read as follows:

"I. Railroads. Section 1 (2) (b)

(2) The provision of this part . . . shall not apply—

(a) To the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property wholly within one State and not shipped to or from a foreign country from or to any place in the United States as aforesaid, except as otherwise provided in this part;

"II. Motor Carriers. Section 202 (b)

Sec. 202

(a) . . .

(b) Nothing in this part shall be construed to affect the powers of taxation of the several States or to . . . authorize a motor carrier to do an intrastate business on the highways of any State, or to interfere with the exclusive exercise by each State of the power

of regulation of intrastate commerce by motor carriers on the highways thereof.

"III. Water Carriers. Section 303 (j)

Sec. 303.

...

(j) Nothing in this part shall be construed to interfere with the exclusive exercise by each State of the power to regulate intrastate commerce by water carriers within the jurisdiction of such State."

There is no foundation whatsoever to support appellants' contention that Congress was thinking in terms of greater regulation when it formulated the limitations in Part II as compared with that in Part I.

(e) Appellants' Arguments

Appellant, American Trucking Associations, Inc., cite *Air Dispatch, Inc. v. U. S.*, 237 F. Supp. 450 (1964), for some support. But in that case motor carriage was being tacked to *common carriage*. Appellant then says "substituting private motor carriage for the air carriage, we submit the situation presented here is essentially no different" (p. 14). But that is the distinction between the cases!

Nor is there any constitutional barrier to the I.C.C. regulating private carriers in interstate commerce as to safety only. Congress did not see fit to regulate private carriage economically and, wisely so, because of the many

problems that would be created. Therefore, while private carriage is not involved in the concept of "transportation" under the Act, it is still commerce.

There is no hiatus of regulation because the states have adopted the same definition of transportation and do not recognize the tacking of private carriage to common carriage for regulatory purposes. Our Commission has exercised control and will continue to do so. That is why we have intervened in this case. Appellants' version of a no man's land is not borne out by the facts.

CONCLUSION

A careful reading of *Pennsylvania R. Co. v. P.U.C. of Ohio* shows that it was based upon the interpretation given to the word "transportation." That word was interpreted as being applicable to common carriers only under Part I. The same phraseology is essentially contained in Part II.

Congress intended only to regulate the transportation of common or contract carriers by motor vehicle. It did not seek to encompass anyone else so far as transportation was concerned. But, in the regulation of safety it sought to encompass private carriers as well. Appellants' primary error is that they assume erroneously that Congress intended to regulate everything in interstate commerce, and that since private carriers are in interstate commerce they are to be regulated not only for safety but also transportationwise. Appellants are placing the emphasis in the wrong place. Congress sought to regulate transportation,

and then only when the goods were committed to a common carrier.

It is respectfully submitted that the issue in this case is clear and free from doubt and does not present any substantial question for decision. It is therefore respectfully requested that our Motion to Affirm be granted.

Respectfully submitted,

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EDWARD MUNCE
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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 510

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

No. 511

THE PENNSYLVANIA RAILROAD COMPANY, APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MEMORANDUM FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

These are direct appeals from a final judgment of a three-judge district court (J.S. 30–31) [1] dismissing an action brought to set aside the report and orders of

[1] "J.S." refers to the jurisdictional statement filed in No. 510.

793-371—65

the Interstate Commerce Commission in *Motor Transportation of Property Within a Single State,* 94 M.C.C. 541 (J.S. 32–51). The Commission decided (with four members dissenting) that for-hire motor transportation within a single State of property which moved (or will move) interstate is not subject to economic regulation by the Commission under Part II of the Interstate Commerce Act if the movement across State lines is by private—rather than for-hire—carriage. The Commission relied upon *Pennsylvania R. Co.* v. *Public Utilities Commission,* 298 U.S. 170, which reached the same conclusion with regard to the Commission's jurisdiction over railroads under Part I of the Act. The Commission's order was affirmed *per curiam* by a three-judge district court (J.S. 27–29).

The legal issue presented by this case concerns the reach of the Commission's jurisdiction over for-hire motor transportation of out-of-state goods moving between points located in the same State. The Commission's holding that it lacks economic regulatory authority if the connecting interstate movement is performed by the shipper is supported by the construction given its authority over railroads in the *Pennsylvania R. Co.* case, *supra.* By analogy, the Commission's authority over motor movement may be deemed to attach only if there is a for-hire segment crossing State lines. But there are differences between the parts of the Act which make the analogy imperfect. Under Part II, for example, the Commission has jurisdiction to reach interstate private carriage for safety (not economic) purposes and, in the

report below, it left open the possibility that the for-hire carriage here at issue might be interstate transportation for purposes of safety regulation (J.S. 45–46).[2] And the language used to define the Commission's jurisdiction is different in these two parts of the Act. Before the decision below, two of the Commission's divisions had, in seven reported decisions, reached conflicting conclusions as to its economic authority over the carriage at issue (J.S. 40–43). We cannot say that the question of the Commission's statutory jurisdiction is so insubstantial as not to warrant plenary hearing. In this respect, therefore, we do not oppose the noting of probable jurisdiction.

We add, however, that the record might be thought to provide an insufficient basis for determining whether there is any significant practical impact to the decision. The statements before the Commission were brief and did not state facts indicating the actual or potential scope of the intrastate for-hire movements at issue. The jurisdictional statements contain representations that the decision will have an adverse impact upon railroads and regulated truckers (No. 510, pp. 21–23; No. 511, p. 5), but there is no precise measure of the substantiality of such harm, and the complaints made no allegations of injury to appellants. While no question regarding justiciability of the dispute was raised below, and the posture of the case is similar, in some respects, to the posture

[2] In addition, Part II has specific provisions dealing with economic regulation of transportation between points within a State when such transportation is in interstate commerce within the meaning of the Act. See Section 206(a)(6), 49 U.S.C. 306(a)(6).

of *Frozen Food Express* v. *United States,* 351 U.S. 40, when that case was decided by this Court, we believe it appropriate to call attention to this procedural problem at the present time.

Respectfully submitted.

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No. 510

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

AMERICAN TRUCKING ASSOCIATIONS, INC., AND
NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC.,
Appellants,

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION,
Appellees.

On Appeal From the United States District Court for the Eastern District of Pennsylvania

---

REPLY TO MEMORANDUM AND MOTIONS TO AFFIRM

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UNITED STATES OF AMERICA AND
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On Appeal From the United States District Court for the Eastern District of Pennsylvania

---

REPLY TO MEMORANDUM AND MOTIONS TO AFFIRM

STATEMENT

Motions to affirm the decision of the district court below have been filed by appellees South Paterson Trucking Company, Inc., Private Carrier Conference, Inc.,[1] The Pennsylvania Public Utility Commission, and Na-

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[1] Although the joint motion of South Paterson Trucking Co., Inc., and Private Carrier Conference, Inc., carries only the docket number 511, we assume it was intended to apply also to this proceeding, and so treat it.

tional Industrial Traffic League, hereinafter jointly referred to as "appellees." A joint memorandum was filed by the United States and Interstate Commerce Commission (hereinafter sometimes "Government") in which they do not oppose the Court's noting probable jurisdiction, but raise the question of whether the case presents justiciable issues. Since the issues involved in this proceeding are important to the Commission's administration of the Interstate Commerce Act, and vitally concern the motor carrier industry represented by appellants, we deem it necessary to reply, pursuant to Rule 16(3), to the memorandum of the Government and appellees' motions to affirm.

I

Issues Involved in This Proceeding Are Justiciable and of Practical Importance

The Government, in its memorandum, after stating that it does not oppose the noting of probable jurisdiction, suggests, however, that there may be a question regarding justiciability. (p. 3)

We disagree strongly with the Government that this proceeding might not be justiciable. In our Jurisdictional Statement, we pointed out in detail that the Commission's finding that the for-hire transportation at issue is not in interstate commerce subject to its economic jurisdiction may well result in a hiatus in the regulatory scheme and free an important segment of the motor carrier industry from any regulation.

The potential scope, from a freight and revenue standpoint, of the for-hire movements of such motor carriers is significant. To illustrate, a manufacturer located in State A and having a shipment going to a point in adjoining State B, would be encouraged, by the Commission's decision, to transport his shipment across the state line, and there to give it to a single-state, for-hire motor carrier

for movement to ultimate destination, thus avoiding both state and federal control. There are a great number of manufacturers so situated, who would take advantage of such a hole in the regulatory structure. It is our fear that the practical result of the decision below will be to divert traffic from many carriers operating on slim margins of profit, with the result that their ability to discharge their statutory duty to render adequate and efficient service to the public will be impaired. Aside from the loss of traffic, the Commission's decision will have a far-reaching effect in the field of safety regulation. As we noted in our Jurisdictional Statement (pp. 22-23), its finding that the for-hire transportation at issue is in *intrastate* commerce, for economic purposes, raises grave doubt whether it is *interstate* commerce for safety purposes.

It must be noted also that appellants and appellees, which represent a large segment of the transport field and its users, are not the only ones who regard this proceeding as one that will have a significant impact on the transportation industry. Besides the parties before the Court, 37 others, including rail and motor carriers, manufacturers, motor carrier associations and associations of manufacturers, and state regulatory Commissions filed statements with the Commission containing their views on this matter when the Commission invited participation by interested persons (J.S. p. 34). And, not to be overlooked either, is that the Commission never questioned the significance and practical impact of its decision until this time. Indeed, the Commission instituted this proceeding for the specific purpose of resolving close to 15 years of conflict between two of its divisions.

It is clear from the foregoing that the Commission's decision here will have an immediate and practical impact on for-hire motor carriers who are engaged in transportation between points in a single state, on for-hire motor carriers who operate across state lines, and on

shippers as well. The decision is, therefore, not abstract, theoretical, or academic; it touches vital interests of carriers and shippers alike and sets standards for shaping the manner in which an important segment of trucking business will hereafter be done. In the circumstances, we submit that the issues raised in this proceeding are justiciable and that the Court should hear this case on its merits.

II

Appellees' Arguments

Appellees advance four reasons to support the affirmance of the district court's decision. These are:

1. The issue here before the Court has been decisively settled in *Pennsylvania R.R. Co.* v. *Public Utilities Commission*, 298 U.S. 170 (1936).

2. The conclusion that the Commission has economic jurisdiction over the involved single-state, for-hire motor carriage would create serious regulatory problems.

3. Congress intended to equalize the regulation of the railroads and the motor carrier industries and to find that the rates of the for-hire carrier under consideration are subject to the Commission's economic regulation is contrary to Congress's National Transportation Policy.

4. The existence of jurisdiction in the federal agency over the subject for-hire carriage would oust jurisdiction which properly lies with the states.

There is no need to reply to the third point because a cursory comparison of Parts I and II of the Interstate Commerce Act shows clearly that there are significant differences in the regulatory scheme for the two modes of transport, and the general provisions of the National Transportation Policy cannot be read to obliterate those differences. *I.C.C.* v. *New York, New Haven & Hartford*

R. Co., 372 U.S. 744, 762 (1963). And there is no need to reply to the fourth point either because we have discussed it at length in our Jurisdictional Statement (pp. 17-20). However, we will comment briefly on the remaining two contentions.

III

The Pennsylvania Case Is Not Controlling

In their motions to affirm appellees say that the *Pennsylvania* case made it clear that transportation begins only when merchandise has been placed in the possession of a carrier subject to economic regulation, that a shipper is not a carrier subject to economic regulation under the provisions of what is now Part I of the Interstate Commerce Act, and that conveyance by a common carrier cannot be combined with carriage by the owner "for the purpose of subjecting the whole to the operation of the statute when the parts would be exempt."

To support their position appellees rely on the statement in the *Pennsylvania* case that whether the rail movement was in interstate commerce was not controlling for the purpose of "determining the application of this Act." "Transportation begins for that purpose, if not for others, when the merchandise has been placed in the hands of a carrier." 298 U.S. at 175. But this statement cannot be taken out of context. What the Court was saying is clear: Since Section 1(1) of Part I of the Interstate Commerce Act applies only to rail common carriers engaged in transportation in interstate commerce across state lines obviously transportation subject to the Commission's jurisdiction could not be said to begin until property was placed in a railroad's possession for transportation by rail from one state to another. However, unlike Section 1(1), Section 202(a) applies to "transportation . . . by motor carriers engaged in interstate or foreign commerce," and there is no exemption of trans-

portation in interstate commerce within a single state. Thus, it is irrelevant where, in the course of the transportation in interstate commerce, the transportation by the for-hire motor carrier begins.[2]

The Commission has a statutory duty to exercise its economic regulatory authority over transportation by for-hire motor carriers engaged in interstate commerce notwithstanding that their physical operations are wholly within a single state. And it is the interstate character of the overall commerce that determines the scope of the Commission's regulation of transportation by for-hire motor carriers. The plain words of Sections 202(a) and 202(a)(10) of Part II of the Act can be read in no other way and there is nothing in their legislative history to suggest that they were intended to be read otherwise.

That appellees have erroneously read the *Pennsylvania* case as supporting their motions to affirm is further shown by the action of the Commission in this proceeding. In concluding that the single-state, for-hire carriage at issue is not subject to its economic regulation, the Commission cited the *Pennsylvania* case and gave as its reasons for so holding the same ones expressed by appellees (J.S. p. 45). The Commission adhered to this position before the district court. However, the Commission has now changed its position. It now admits that the *Pennsylvania* case may not be controlling, because of the difference in the language of Parts I and II defining its jurisdiction. Thus it states in its memorandum:

---

[2] Equally irrelevant, and completely incorrect, is the statement contained in the motion of appellees South Paterson Trucking Co. and Private Carrier Conference (p. 5) that the *Pennsylvania* case was decided in the light of this Court's knowledge of the Commission's safety jurisdiction over private motor carriage. As a matter of fact, the Commission exercised no such jurisdiction until four years after the *Pennsylvania* decision, when it found, pursuant to § 204(a)(3), 49 U.S.C. § 304(a)(3), that there was a need "therefor." *Motor Carrier Safety Regulations—Private Carriers*, 23 M.C.C. 1 (1940).

> The Commission's holding that it lacks economic regulatory authority if the connecting interstate movement is performed by the shipper is supported by the construction given its authority over railroads in the *Pennsylvania R. Co.* case, *supra.* By analogy, the Commission's authority over motor movement may be deemed to attach only if there is a for-hire segment crossing State lines. But there are differences between the parts of the Act which make the analogy imperfect. Under Part II, for example, the Commission has jurisdiction to reach interstate private carriage for safety (not economic) purposes and, in the report below, it left open the possibility that the for-hire carriage here at issue might be interstate transportation for purposes of safety regulation (J.S. 45-46). And the language used to define the Commission's jurisdiction is different in these two parts of the Act. Before the decision below, two of the Commission's divisions had, in seven reported decisions, reached conflicting conclusions as to its economic authority over the carriage at issue (J.S. 40-43). We cannot say that the question of the Commission's statutory jurisdiction is so insubstantial as not to warrant plenary hearing. In this respect, therefore, we do not oppose the noting of probable jurisdiction. (Memorandum, pp. 2-3).

It is clear, therefore, and the Government agrees, that the *Pennsylvania* case is distinguishable from the case now before the Court.

IV

A Holding That the Commission Has Economic Jurisdiction Would Not Create Regulatory Problems

Appellees claim that for this Court to hold that the involved for-hire motor carrier transportation is subject to the Commission's economic jurisdiction would result in a disruption of present transportation practices and impose burdens upon shippers and carriers alike.

The short answer to this contention is that the Commission, the federal agency charged with the responsibility of administering the Interstate Commerce Act, makes no claim that our interpretation of the Act would create regulatory problems, much less cause chaos. The shipper knows whether his shipment is to have a continuous movement from a point in one state to a point in another. If it is such a shipment, he has an obligation to tender it to a motor carrier with appropriate interstate operating rights. This is no problem, because shippers face this situation every day and without apparent difficulty.

As to the motor carrier's alleged inability to determine what rates to apply to the shipment, we point out that motor carriers, as well as railroads, are confronted daily with the task of determining whether to apply intra- or interstate rates on a given movement. See *Baltimore & Ohio S. W. R.* v. *Settle*, 260 U.S. 166 (1922); *Atlantic Coast Line R. Co.* v. *Standard Oil Co.*, 275 U.S. 257 (1927); *United States* v. *Majure*, 162 F. Supp. 594 (1957); *Petroleum Products Transported Within A Single State*, 71 M.C.C. 17 (1957). In all those cases it was necessary to determine whether transportation performed within a single state was part of a continuous movement in interstate commerce, a question that can be answered only by ascertaining the shipper's fixed and persistent intent at the time of shipment.

CONCLUSION

Appellants respectfully submit that the questions posed by the decision below are of extreme public importance and require plenary consideration by this Court. Therefore, appellants request that the motions to affirm be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Peter T. Beardsley, one of the attorneys for appellants herein, and a member of the bar of the Supreme Court of the United States, hereby certify that, on the 6th day of December, 1965, I served copies of the foregoing document on the several parties hereto, as follows:

1. On the United States, by mailing copies in duly addressed envelopes, with postage prepaid, to the Honorable

Thurgood Marshall, The Solicitor General, Department of Justice, Washington, D. C. 20530; to Robert B. Hummel, Esq., Chief, Appellate Section, Antitrust Division, Department of Justice, Washington, D. C. 20530; and to Drew J. T. O'Keefe, Esq., United States Attorney, Eastern District of Pennsylvania, Philadelphia, Pennsylvania.

2. On the Interstate Commerce Commission, by mailing copies in duly addressed envelopes, with postage prepaid, to Robert W. Ginnane, Esq., General Counsel, and I. K. Hay, Esq., Deputy General Counsel, at the Offices of the Commission, Washington, D. C. 20423.

3. On the Pennsylvania Railroad Company, by mailing copies in duly addressed envelopes, with postage prepaid, to Carl Helmetag; Esq., Assistant General Counsel, and Carmine J. Liotta, Esq., 1138 Transportation Center, Six Penn Center Plaza, Philadelphia, Pennsylvania.

4. On South Paterson Trucking Co., Inc., and Private Carrier Conference, Inc., by mailing copies in duly addressed envelopes, with postage prepaid, to Joseph E. Keller, Esq., and William H. Borghesani, Jr., Esq., 1712 N Street, N. W., Washington, D. C. 20036.

5. On the National Industrial Traffic League, by mailing copies in duly addressed envelopes, with postage prepaid, to John F. Donelan, Esq., and William L. Slover, Esq., 888 - 17th Street, N. W., Washington, D. C.

6. On the Pennsylvania Public Utility Commission, by mailing copies in duly addressed envelopes, with postage prepaid, to Joseph C. Bruno, Esq., Chief Counsel, and William A. Goichman, Esq., Assistant Counsel, North Office Building, Harrisburg, Pennsylvaia.

PETER T. BEARDSLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 510

AMERICAN TRUCKING ASSOCIATIONS, INC. AND NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC., *Appellants*

v.

UNITED STATES OF AMERICA ET AL., *Appellees*

No. 511

THE PENNSYLVANIA RAILROAD COMPANY, *Appellant*

v.

UNITED STATES OF AMERICA ET AL., *Appellees*

On Appeal From The United States District Court For The Eastern District of Pennsylvania

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PETITION FOR REHEARING

In this case the Interstate Commerce Commission construed Section 202(a) of Part II of the Interstate Commerce Act, 49 U.S.C. § 303(a), which defines its basic regulatory jurisdiction over motor transportation in the following terms:

> "The provisions of this part apply to the transportation of passengers or property by motor carriers engaged in interstate or foreign commerce and to the procurement of and the provision of facilities for such transportation, and the regulation of such transportation, and of the procurement thereof, and the provision of facilities therefor, is hereby vested in the Interstate Commerce Commission."

The Commission held, four members dissenting, that Section 202(a) gives it no economic regulatory authority over for-hire motor transportation within a single state of property in the course of continuous movement from one state to another if the movement across state lines is performed by a private, as distinguished from a for-hire, carrier. The District Court for the Eastern District of Pennsylvania affirmed *per curiam*.

The Commission now has second thoughts. In response to Appellants' Jurisdictional Statements to this Court it joined the United States in a Memorandum in which they point to shortcomings in the rationale of the Commission's decision, conclude that they cannot say that the question "is so insubstantial as not to warrant plenary hearing," and therefore "do not oppose the noting of probable jurisdiction." The Memorandum then goes on to say "that the record might be thought to provide an insufficient basis for determining whether there is any significant practical impact to the decision," in view of the absence therefrom of "facts indicating the actual or potential scope of" the transportation at issue.

Were the Commission's decision before this Court on a petition for a writ of certiorari, the suggested inadequacy of the factual record might well justify the denial of the writ, the effect of which would be to leave the admittedly substantial question of law open for decision on an adequate record. But the Commission's decision is before this Court on appeal from the District Court's judgment affirming it. This Court's affirmance of that judgment, unlike the refusal to review it, definitely and finally commands the construction of the statute the Commission adopted. We submit that a substantial question of law going to the reach of the basic jurisdiction over motor carriage granted by the Congress to the Interstate Commerce

Commission should not be summarily resolved by this Court.

Appellants here are the regulated motor and rail carriers. As their jurisdictional statements say, the Commission's decision will adversely affect them. However, if this Court is of the view that it should not resolve the substantial question of law presented on the record made before the Commission, we submit that the appropriate action is to vacate the judgment of the District Court with directions to remand the case to the Commission for further proceedings in which an adequate record can be made. Appellants so pray.*

Respectfully,

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March 23, 1966

* The Memorandum also refers to "a procedural problem", i.e., the "justiciability of the dispute". If the Commission's order is not judicially reviewable there is no case or controversy and the District Court's decision on the merits and this Court's affirmance of it are advisory opinions.

CERTIFICATE OF COUNSEL

I, the undersigned counsel in the above cause, do hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay and that this Petition is restricted to grounds not previously presented in accordance with Paragraph 2 of Rule 58 of the Court.

BRYCE REA, JR.